

**SOAH DOCKET NO. 578-16-0462**

<b>TEXAS BOARD OF VETERINARY MEDICAL EXAMINERS, Petitioner</b>	§ § § § § § § § §	<b>BEFORE THE STATE OFFICE     OF    ADMINISTRATIVE HEARINGS</b>
<b>v.</b>		
<b>KRISTEN E. LINDSEY, D.V.M., Respondent</b>		

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**SOAH DOCKET NO. 578-16-0462**

**TEXAS BOARD OF VETERINARY  
MEDICAL EXAMINERS,  
Petitioner**

**v.**

**KRISTEN E. LINDSEY, D.V.M.,  
Respondent**

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**BEFORE THE STATE OFFICE**

**OF**

**ADMINISTRATIVE HEARINGS**

**PROPOSAL FOR DECISION**

The staff (Staff) of the Texas Board of Veterinary Medical Examiners (Board) seeks to revoke the license of Kristen E. Lindsey, D.V.M. (Respondent) to practice veterinary medicine. Staff alleges that Respondent engaged in the criminal offense of cruelty to non-livestock animals<sup>1</sup> in violation of §§ 801.402(4) and (6) of the Texas Veterinary Licensing Act (Act)<sup>2</sup> and Board Rule 573.4.<sup>3</sup> As discussed below, the Administrative Law Judges (ALJs) find that Staff proved a Class B violation under the Board's schedule of sanctions. The ALJs recommend the Board: suspend Respondent's license for five years, with four years fully probated and quarterly reporting;<sup>4</sup> require her to take continuing education in the areas of veterinary jurisprudence and animal welfare (and/or such other classes as the Board deems fit); and impose a community service requirement of at least 100 hours of volunteering time at a feline rescue, free spay/neuter clinic, or similar facility.

**I. JURISDICTION, NOTICE, AND PROCEDURAL HISTORY**

Staff docketed this case at the State Office of Administrative Hearings (SOAH) on September 30, 2015. Respondent filed two pleas to the jurisdiction that were denied by the

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<sup>1</sup> Texas Penal Code § 42.092(b)(2).

<sup>2</sup> Tex. Occ. Code ch. 801.

<sup>3</sup> 22 Tex. Admin. Code § 573.4. The Board's rules are contained in chapters 571-77 of part 24 of title 22 of the Texas Administrative Code. For convenience, these provisions may be cited as "Board Rule 57x.XX."

<sup>4</sup> Respondent has already been unemployed as a veterinarian since April 17, 2015, when she was terminated from her last job.

ALJs, and re-urged her jurisdictional arguments in her written closing arguments. The pleas to the jurisdiction contend that Board rules are invalid and cannot be applied against Respondent if such rules do not comport with the Board's authorizing statute (the Act). Specifically, Respondent argues that Board Rules 573.4 and 575.50—relied upon by Staff in this proceeding—constitute an impermissible expansion by the Board of the disciplinary authority granted by the Legislature through Act §§ 801.402(4) and (6), which are the basis of the allegations contained in Staff's First Amended Notice of Hearing.<sup>5</sup>

In her pleas to the jurisdiction, Respondent notes that Act § 801.402(18) permits discipline on the basis of, among other things, a *conviction* for cruelty to non-livestock animals under Texas Penal Code § 42.092. It is undisputed that a grand jury in Austin County, Texas, “no-billed” Respondent on a charge of violating Penal Code § 42.092. Also, Staff did not plead a claim under Act § 801.402(18). Therefore, Respondent argues, she is not subject to direct disciplinary action under authority of Act § 801.402(18), and the Board should not be able to indirectly discipline her for the same conduct through the combination of Act §§ 801.402(4) and (6), and Board Rules 573.4 and 575.50(f)(5)(J).<sup>6</sup>

In Order Nos. 5 and 10, the ALJs denied Respondent's pleas to the jurisdiction because they did not state a basis on which SOAH ALJs are empowered to act. Moreover, the Administrative Procedure Act (Texas Government Code chapter 2001), directs that the “validity or applicability of a rule” may be determined in an action for declaratory judgment, but that action may “be brought only in a Travis County district court.”<sup>7</sup> Given that SOAH is not the appropriate forum for consideration of Respondent's arguments, they are not addressed further in this Proposal for Decision (PFD).

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<sup>5</sup> As detailed in Order No. 10, Respondent argued that the Board exceeded the authority granted by the Act by including a provision in Board Rule 573.4 that states, “a complaint, indictment, or conviction of a law violation is not necessary” to impose disciplinary action for such conduct. Respondent cited as support *Texas State Board of Veterinary Medical Examiners v. Jefferson*, No. 03-14-00774-CV (Tex. App.—Austin, Feb. 26, 2016), which invalidated Board Rules 573.72 and .80(2). The Court did not address the Board's rules at issue in this proceeding.

<sup>6</sup> Respondent's Final Summation at 3, 23.

<sup>7</sup> Tex. Gov't Code § 2001.038. At the time the ALJs considered Respondent's second plea to the jurisdiction, Respondent's Petition for Declaratory Judgment and Equitable Relief, filed on or about April 8, 2016, was pending before the Travis County district court. The ALJs are unaware of the disposition of the petition.

The hearing on the merits was held on April 25-26, 2016, before ALJs Catherine C. Egan and Pratibha J. Shenoy at the SOAH hearing facilities, 300 West 15th Street, Fourth Floor, Austin, Texas. Staff Attorney Michelle Griffin represented Staff. Attorney Brian Bishop represented Respondent. At the close of the evidentiary hearing, the ALJs granted the parties' request to submit written closing arguments and briefs. The record closed on July 8, 2016, after the parties filed their reply briefs.

## II. UNCONTESTED FACTS AND DISPUTED ISSUES

### A. Uncontested Facts

Respondent graduated from the University of Wyoming with a bachelor's degree in biology in 2006. In 2012, she received a doctor of veterinary medicine (D.V.M.) degree from Colorado State University College of Veterinary Medicine. Respondent was licensed by the Board under Texas Veterinary License No. 12622 on June 25, 2012. For approximately one year beginning in June 2012, Respondent held an internship at Equine Sports Medicine & Surgery in Weatherford, Texas. In July 2013, Respondent began working at Washington Animal Clinic (the Clinic) in Brenham, Texas. At the Clinic, Respondent specialized in equine medicine, but also treated cats and dogs.

On April 15, 2015, Respondent shot an orange tabby cat through the head with an arrow. Respondent's mother took a photograph of Respondent holding the shaft of the arrow with the cat dangling down. Respondent posted the photo on her Facebook page with the caption:

My first bow kill [cat emoticon] lol. The only good feral tomcat is one with an arrow through it's [sic] head! Vet of the year award . . . gladly accepted [crying/laughing emoticon]"<sup>8</sup>

The photograph and caption went "viral," generating news coverage nationwide as well as around the world. The Board received thousands of complaints from private citizens,

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<sup>8</sup> Respondent (Resp.) Exhibit (Ex.) 15.

veterinary professionals, animal welfare groups, and others. Respondent and her family members were threatened with rape, bodily injury, and death.

Respondent's employment at the Clinic was terminated by the Clinic's owners on April 17, 2015.<sup>9</sup> A criminal charge of Cruelty to Non-Livestock Animals was presented to a grand jury in Austin County, Texas, on June 24, 2015. The grand jury returned a Notice of No-Bill, ending the criminal prosecution of Respondent.<sup>10</sup>

The parties generally agreed on two key terms used in this case. First, both Respondent and Staff's expert, William Folger, D.V.M., agreed that "tomcat" is used, at least by veterinarians, to refer to an unneutered male cat.<sup>11</sup> Second, the parties agreed that a "feral" cat is a cat that has not been socialized around humans, although they disagreed as to the age after which an un-socialized cat should be considered feral. Dr. Folger stated that a feral cat is one that has not been socialized by the time it is 24 to 30 weeks of age.<sup>12</sup> Respondent's expert, Paul Smith, D.V.M., opined that kittens must be caught and socialized before 10 weeks of age.<sup>13</sup> Staff's expert Gail Golab, D.V.M., said the American Veterinary Medical Association (AVMA) considers feral cats to include cats that exist completely on their own without human support as well as "managed colonies" of feral cats that are subject to trap-neuter-release practices.<sup>14</sup> For purposes of this PFD, "feral" is used to mean a cat that has not been socialized by humans.

## **B. Disputed Issues**

Staff contends that the cat shot by Respondent was Tiger, a domesticated, neutered, male tabby owned by Bill and Clare Johnson, who lived across the street from Respondent's home, and that Respondent's actions violated Texas Penal Code § 42.092(b)(2) (prohibiting animal

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<sup>9</sup> Staff Ex. 7.

<sup>10</sup> Resp. Ex. 20.

<sup>11</sup> Transcript of Hearing on the Merits (Tr.) Vol. 1 at 165-66, Vol. 2 at 64.

<sup>12</sup> Tr. Vol. 2 at 20.

<sup>13</sup> Tr. Vol. 2 at 115.

<sup>14</sup> Tr. Vol. 1 at 219-20.

cruelty). According to Staff, because Respondent engaged in the act of cruelty to an animal, her veterinarian's license is subject to sanctions pursuant to Act § 801.402(4) and Board Rule 575.50.<sup>15</sup> Staff alleges that the conduct also is subject to sanction under Act § 801.402(6) and Board Rule 573.4, as a violation of the Board's Rules of Professional Conduct.

Respondent disputed that the cat she shot was Tiger, and insisted that it was a feral, intact male tabby that had attacked her cat, sprayed urine on her property, and defecated in and around her horse feed troughs. Both parties presented evidence concerning the markings and physical features of the dead cat, including Respondent's April 15, 2015 Facebook post and a photograph Respondent took approximately 24 hours later of the cat's genital area.<sup>16</sup> Staff argued, based on the cat's unique body markings and the size and shape of his scrotal sac, that the cat was Tiger. Respondent contended that the cat's markings were not particularly unusual among tabby cats, and that the photograph of the remains depicted two testicles.

### **III. APPLICABLE LAW**

This case presents two major issues for analysis: whether Respondent committed acts that are subject to discipline by the Board, and if so, the appropriate sanction the Board should impose. Section III.A below discusses the law applicable to determining whether Respondent's conduct is subject to sanction by the Board. The corresponding analysis is contained in Section IV. Section III.B below specifies the law applicable to determining the sanctions available. The sanction analysis is contained in Section V.

#### **A. Law Related to Respondent's Conduct**

The Board is authorized to take disciplinary action against a Texas veterinarian who has engaged in dishonest or illegal practices in, or connected with, the practice of veterinary medicine; engaged in conduct that violates the Board's rules of professional conduct; or is

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<sup>15</sup> 22 Tex. Admin. Code § 575.50.

<sup>16</sup> Resp. Ex. 17.



convicted of an offense under Penal Code § 42.092 regarding animal cruelty.<sup>17</sup> Among the Board's disciplinary powers is the authority to revoke or suspend a license, reprimand a license holder, impose administrative penalties, and require license holders to participate in continuing education programs.<sup>18</sup>

Board Rule 573.4 states that “[n]o licensee shall commit any act that is in violation of the laws of the State of Texas, other states, or of the United States, if the act is connected with the licensee’s professional practice, including, but not limited to, the acts enumerated in § 575.50(f) of this title (relating to Criminal Convictions).”<sup>19</sup> The rule states that a “complaint, indictment, or conviction of a law violation is not necessary for the enforcement of this rule” and that “[p]roof of the commission of the act while in the practice of, or under the guise of the practice of . . . veterinary medicine . . . is sufficient for action by the Board under this rule.”<sup>20</sup> Board Rule 575.50 provides:

- (f) The professional practices of veterinarians, licensed veterinary technicians, and equine dental providers place those licensees in positions of public trust. A licensee practices in an autonomous role in the treating and safekeeping of animals; preparing and safeguarding confidential records and information; accepting client funds; and, if the licensee is a veterinarian, prescribing, administering and safely storing controlled substances. The following crimes therefore relate to and are connected with the practices of veterinarians, licensed veterinary technicians, and equine dental providers because the commission of each indicates a violation of the public trust, and a lack of integrity and respect for one’s fellow human beings and the community at large:

\* \* \*

- (5) a misdemeanor or felony offense involving:

\* \* \*

- (J) animal cruelty.

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<sup>17</sup> Tex. Occ. Code §§ 801.401, .402(4), (6), (18). As mentioned, Staff did not assert a claim against Respondent under Act § 801.402(18), which permits discipline based on a conviction for cruelty to non-livestock animals.

<sup>18</sup> Tex. Occ. Code § 801.401.

<sup>19</sup> As originally enacted, this provision contained an incorrect citation to “§ 575.50(e) of this title (relating to Criminal Convictions).” The citation was corrected by the Board (to “§ 575.50(f) . . .”) effective November 22, 2015. 40 Tex. Reg. 8025 (Nov. 13, 2015).

<sup>20</sup> 22 Tex. Admin. Code § 573.4.

Texas Penal Code § 42.092(b)(2) states that a person commits the offense of cruelty to a non-livestock animal “if the person intentionally, knowingly, or recklessly . . . without the owner’s effective consent, kills, administers poison to, or cause serious bodily injury to an animal.” Section 42.092(a)(2) defines an “animal” to mean a “domesticated living creature, including any stray or feral cat or dog . . . .”

Various defenses are available to prosecution under Texas Penal Code § 42.092(b)(2). A defense may be asserted if the conduct engaged in by the person is considered to be “generally accepted and otherwise lawful . . . wildlife management, wildlife or depredation control, or shooting preserve practices as regulated by state and federal law.”<sup>21</sup> Another defense is available under Texas Penal Code §§ 9.02 and .21, whereby a person may argue that her conduct is justified because she reasonably believed the conduct was required or authorized by law.

In a criminal context, the standard of proof is more stringent than in a civil or administrative context. The prosecutor must establish each element of the crime by proof beyond a reasonable doubt in order to obtain a conviction.<sup>22</sup> Board Rule 573.4 permits disciplinary action based on “[p]roof of the commission of the act while in the practice of, or under the guise of the practice of . . . veterinary medicine.” Accordingly, it appears that the rule permits sanctions based on the preponderance of the evidence standard that applies in this administrative context.

## **B. Law Related to Sanctions**

The Board has promulgated a Recommended Schedule of Sanctions.<sup>23</sup> Sanctions are based on whether the violation is a Class A, Class B, or Class C violation. A licensee commits a

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<sup>21</sup> Tex. Penal Code § 42.092(f)(1)(B). Depredation is defined by reference to Texas Parks and Wildlife Code § 71.001. Tex. Penal Code § 42.092(a)(5).

<sup>22</sup> See Tex. Penal Code § 2.01 (“All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt.”)

<sup>23</sup> 22 Tex. Admin. Code § 575.25.

Class A violation if the licensee is considered to “present imminent peril to the public.”<sup>24</sup> Class A violations include engaging in practices in violation of the Board’s Rules of Professional Conduct.

However, conduct contrary to the Board’s Rules of Professional Conduct may also be deemed a Class B violation. If a licensee has no history of prior violations, but “the nature and severity of the violation(s) necessitates a greater penalty than that available for a Class C violation, but does not rise to the level of creating an imminent peril to the public,” the conduct may be deemed a Class B violation.<sup>25</sup> In addition, Class B violations include engaging in illegal practices “in or connected with the licensee’s practice.”<sup>26</sup> Class C violations include “minor violations included in Class A and/or B in which there is no hazard or potential hazard created to the health, safety, or economic welfare of the public and no economic harm to property or to the environment.”<sup>27</sup>

For both Class A and Class B violations, Board Rule 575.25 provides that, in assessing sanctions and/or penalties, the Board and SOAH should consider:

the seriousness of the violation, including the nature, circumstances, extent, and gravity of any prohibited acts; the hazard or potential hazard created to the health, safety, or economic welfare of the public; the economic harm to property or the environment caused by the violation; the history of previous violations; what is necessary to deter future violations; and any other matters that justice may require.<sup>28</sup>

Class C violations require consideration of: the good or bad faith exhibited; evidence that the violation was willful; the extent to which the person cooperated with the investigation; and the extent to which the person mitigated or attempted to mitigate any damage or injury caused.<sup>29</sup>

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<sup>24</sup> 22 Tex. Admin. Code § 575.25(a).

<sup>25</sup> 22 Tex. Admin. Code § 575.25(b).

<sup>26</sup> 22 Tex. Admin. Code § 575.25(b)(1)(B).

<sup>27</sup> 22 Tex. Admin. Code § 575.25(c).

<sup>28</sup> 22 Tex. Admin. Code § 575.25(a)(2), (b)(2).

<sup>29</sup> 22 Tex. Admin. Code § 575.25(c)(3).

#### **IV. WHETHER RESPONDENT VIOLATED THE ACT**

The identity of the cat is the threshold question in the analysis of this case because Staff's charges hinge on whether Respondent killed an owned cat without the owner's effective consent, thereby engaging in conduct that amounted to animal cruelty. A person charged with animal cruelty under Texas Penal Code § 42.092(b)(2) must be shown to have killed or caused serious bodily injury to an animal (a domesticated living creature, including a stray or feral cat); the conduct must have been without the owner's effective consent; the mental state of the actor must be intentional, knowing, or reckless; and there must be no valid defenses, such as depredation or justification. As discussed below, the parties disagreed as to whether: Respondent acted without effective consent of the cat's owner; Respondent's conduct was intentional, knowing, or reckless; defenses to a charge of animal cruelty under Texas Penal Code § 42.092 are applicable; and whether Respondent's conduct was connected with, or committed under the guise of the practice of, veterinary medicine. Each issue is discussed below.

##### **A. Whether the Cat was Owned or Feral**

###### **1. Staff's Evidence**

###### **a. Testimony of Clare and Bill Johnson**

The Johnsons have lived on the north side of New Wehdem Road in Brenham, Texas, for about 17 years. Ms. Johnson testified that she knew most of her neighbors, but she did not know Respondent. Paula Hudgins and Nico Praagman (collectively referred to as the Hudginses), Tiger's original owners, lived on the east side of the Johnsons' property until they moved in early 2015. Bruce Buenger, D.V.M., Respondent's supervisor and landlord, lived across the street from the Johnsons. Respondent's rental home was directly across from the Johnsons' pasture land on the south side of New Wehdem Road.

According to Ms. Johnson, the Hudginses moved for health reasons, and in March 2015 they gave her and her husband Tiger and their two horses. Ms. Johnson testified that she had

known Tiger since the Hudginses found him seven years earlier, and described him as a healthy cat that loved people and horses.<sup>30</sup> Mr. Johnson confirmed that Tiger had been with them for about a month before he went missing and described him as passive and calm.<sup>31</sup>

Ms. Johnson testified that they kept the horses in their front pasture, directly across New Wehdem Road from Respondent's home.<sup>32</sup> When the Hudginses left, Ms. Johnson said, Tiger stayed with the horses in the front pasture during the day. At night, Tiger returned to Mr. Johnson's woodworking shop to be fed and to sleep.<sup>33</sup> According to Ms. Johnson, she and her husband had driven to Houston on April 15, 2015, and were preparing to leave the next day for Virginia. They had hired a local pet sitter, Amy Hemsell, to care for Tiger in their absence because Ms. Hemsell had a "long-standing relationship with Tiger through [the Hudginses]."<sup>34</sup>

According to Ms. Johnson, the last time she recalled seeing Tiger was the previous weekend, but she noted that Tiger had eaten the food she put out for him in the woodworking shop over the weekend. She explained that the woodworking shop had a cat door and that she put Tiger's food up on the top shelf. Mr. Johnson testified that other than squirrels in the attic and some mice, he was not aware of any other animals going into his woodworking shop.<sup>35</sup> Ms. Johnson recalled that Tiger had eaten the wet food she put out for him on Monday.<sup>36</sup> On Tuesday night (April 14, 2015), Ms. Johnson put out Tiger's wet food, but the next morning, she said that Tiger had not eaten his wet food, which was irregular, so she called Ms. Hemsell to let her know to watch for him.<sup>37</sup>

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<sup>30</sup> Tr. Vol. 1 at 36-37.

<sup>31</sup> Tr. Vol. 1 at 79-80.

<sup>32</sup> Tr. Vol. 1 at 36-37.

<sup>33</sup> Tr. Vol. 1 at 37.

<sup>34</sup> Tr. Vol. 1 at 38.

<sup>35</sup> Tr. Vol. 1 at 90.

<sup>36</sup> Tr. Vol. 1 at 39.

<sup>37</sup> Tr. Vol. 1 at 39.

On Friday morning (April 17, 2015), Ms. Johnson received an email from Ms. Hemsell with Respondent's Facebook photograph attached. When she saw the photograph, her first impression was "Oh, my god, that's Tiger."<sup>38</sup> Ms. Johnson testified that she knew it was Tiger because of the cat's coloring, size, his tiger stripes, and especially his white markings, that were his "trademark, his distinction."<sup>39</sup> She recalled that the white fur went down Tiger's neck and underneath, his paws were white, he had a tiger-striped tail, and he had a white band across his hind leg.<sup>40</sup>

Ms. Johnson said she is aware that her neighbors, the Clearys, have "several orange and white cats" that are allowed to "run loose."<sup>41</sup> Mr. Johnson agreed that the Clearys have "a gazillion" free-roaming cats.<sup>42</sup> Despite this, both of the Johnsons confirmed that the cat in Respondent's photograph is Tiger.<sup>43</sup> Ms. Johnson testified that she has not seen Tiger since April 15, 2015, and was upset that Respondent never offered to return Tiger's body to her so she could bury him.<sup>44</sup>

Ms. Johnson expressed frustration with the Austin County Sheriff's Office because no one called her, or Tiger's prior owners, to take a written statement before concluding the criminal investigation. However, she agreed that she spoke to Deputy Harold Riddle on the telephone, and understood that the investigation was being closed after their conversation.<sup>45</sup> Ms. Johnson said that she called the Sheriff's office to offer help, and to ask for Tiger's remains so he could have a proper burial. She also testified that the vitriolic statements written on-line about Respondent's Facebook post scared her.

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<sup>38</sup> Tr. Vol. 1 at 39; Staff Ex. 4.

<sup>39</sup> Tr. Vol. 1 at 40.

<sup>40</sup> Tr. Vol. 1 at 40.

<sup>41</sup> Tr. Vol. 1 at 54.

<sup>42</sup> Tr. Vol. 1 at 91.

<sup>43</sup> Tr. Vol. 1 at 40, 80.

<sup>44</sup> Tr. Vol. 1 at 42.

<sup>45</sup> Tr. Vol. 1 at 189-90, 196.

**b. Amy Hemsell's Testimony**

Ms. Hemsell has lived in Brenham, Texas, for about six years and is familiar with New Wehdem Road and the Johnson's property.<sup>46</sup> She has been operating her own pet-sitting business for the past four years and began pet-sitting for the Hudginses' horses, goats, dogs, and cats, including Tiger, in 2012.<sup>47</sup> Throughout the three years that she pet-sat for the Hudginses, Ms. Hemsell said, she saw no stray cats in the area. Ms. Hemsell is aware that the Clearys are the Johnsons' neighbors, but said she has never met them and does not know how many cats they have or if they have any orange-and-white cats.<sup>48</sup> In addition to her pet-sitting business, Ms. Hemsell volunteers at True Blue Animal Rescue.<sup>49</sup>

Ms. Hemsell described Tiger as a healthy, neutered cat that weighed about 10 pounds and was friendly with other animals and people. His coat was not mangled or dirty.<sup>50</sup> Although Tiger was protective of his horses and his property, Ms. Hemsell said that when she called Tiger he came to her.<sup>51</sup> While Tiger still lived with the Hudginses, Ms. Hemsell said, he mostly stayed in the barn or in the pens with the horses. When she was pet-sitting for the Hudginses, Ms. Hemsell would feed the horses and then drive a Gator (a small utility vehicle) back to the house. She said that Tiger would stand on the front of the Gator and ride with her from the barn to the Hudginses' house to get his dinner.<sup>52</sup> Because her friends wanted to see Tiger riding on the Gator, in November 2014, Ms. Hemsell videotaped him doing so.<sup>53</sup>

After Tiger was given to the Johnsons in February 2015, Ms. Hemsell recalled that Tiger returned to the former Hudginses property a few times. But, she explained, he returned to the

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<sup>46</sup> Tr. Vol. 1 at 94.

<sup>47</sup> Tr. Vol. 1 at 95, 112.

<sup>48</sup> Tr. Vol. 1 at 104.

<sup>49</sup> Tr. Vol. 1 at 94.

<sup>50</sup> Tr. Vol. 1 at 96-97.

<sup>51</sup> Tr. Vol. 1 at 101.

<sup>52</sup> Tr. Vol. 1 at 96-97.

<sup>53</sup> The video was admitted into evidence as Staff Ex. 1.

Johnson's property in the evening for his dinner.<sup>54</sup> Ms. Hemsell testified that eventually Tiger understood that the Hudginses' horses, which had been his companions for many years, were now fenced off in the Johnsons' pasture.<sup>55</sup>

On April 15, 2015, Ms. Hemsell was pet-sitting Tiger and the Johnsons' other pets. She said that because she had another full-time job, she did not arrive at the Johnsons' ranch until around 5:30 p.m.<sup>56</sup> After letting the dogs out, Ms. Hemsell went to the woodworking shed where the Johnsons fed Tiger.<sup>57</sup> Although she did not see Tiger, Ms. Hemsell testified that she had to fill Tiger's food bowl because it was empty. The next morning, Ms. Hemsell discovered that Tiger had not eaten the food she left out for him the night before. According to Ms. Hemsell, this was very unusual for Tiger.<sup>58</sup>

Ms. Hemsell stated that when she saw Respondent's Facebook photograph the night of April 16, 2015, her first thought was that the cat was Tiger because of the white stripe on his left leg, the white markings around his neck, and the darker strips on his coat.<sup>59</sup> Ms. Hemsell looked for Tiger the next morning, but could not find him. According to Ms. Hemsell, she spent about 45 minutes walking around the former Hudgins property (adjacent to the Johnsons' house) calling for Tiger before returning to the Johnsons' land, where she spent another half hour searching for him. Ms. Hemsell stated she has not since seen Tiger.<sup>60</sup> She stressed that she is certain the cat in Respondent's Facebook photograph is Tiger.

On April 17, 2015, Ms. Hemsell called to notify Ms. Johnson that Tiger was missing and to tell her about Respondent's Facebook post. The same day, she went to the Sheriff's office and reported that she had not seen Tiger on April 15, 2015, but did have to refill his food bowl that

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<sup>54</sup> Tr. Vol. 1 at 97.

<sup>55</sup> Tr. Vol. 1 at 98.

<sup>56</sup> Tr. Vol. 1 at 115-16.

<sup>57</sup> Tr. Vol. 1 at 99.

<sup>58</sup> Tr. Vol. 1 at 99-100.

<sup>59</sup> Tr. Vol. 1 at 100.

<sup>60</sup> Tr. Vol. 1 at 101.



day. She also reported her belief the cat in Respondent's photograph was Tiger.<sup>61</sup> On April 17, 2015, Ms. Hemsell noted on her Facebook page that "[i]t still had not been determined if this was Tiger, and the incident is under investigation." On April 19, 2015, she reported on her Facebook page that nothing had yet been confirmed as to whether the cat was Tiger.<sup>62</sup>

Ms. Hemsell agreed that Respondent claimed to have shot a feral tomcat. However, Ms. Hemsell explained, even though Tiger was neutered he still had what appeared to be testicles.<sup>63</sup> She confirmed that Tiger did not wear a collar and she had never seen him on the south side of New Wehdem Road near Respondent's home.<sup>64</sup> She emphasized, however, that the Johnsons' property ran along the north side of New Wehdem Road across from Respondent's house, and the Johnsons let the horses (formerly belonging to the Hudginses) graze in that area.<sup>65</sup>

**c. Testimony of William Folger, D.V.M.**

Staff's expert, Dr. Folger, has been a licensed veterinarian in Texas for 34 years. He works in a four-doctor specialty practice and is board-certified as a feline specialist by the American Board of Veterinary Practitioners, a specialty recognized by the American Veterinary Medical Association (AVMA).<sup>66</sup> For the past 23 years, Dr. Folger's veterinary practice has been exclusively feline. Dr. Folger participates and volunteers in many programs directed at non-lethal strategies to reduce animal overpopulation.<sup>67</sup>

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<sup>61</sup> Tr. Vol. 1 at 116.

<sup>62</sup> Tr. Vol. 1 at 113-14.

<sup>63</sup> Tr. Vol. 1 at 104.

<sup>64</sup> Tr. Vol. 1 at 107, 111.

<sup>65</sup> Tr. Vol. 1 at 111.

<sup>66</sup> Tr. Vol. 2 at 7.

<sup>67</sup> Tr. Vol. 2 at 7-9. Dr. Folger testified that in the mid-1980s he volunteered for the Harris County Overpopulation Task Force offering spay/neuter services for pets belonging to the indigent in Houston. In 1992, he became a founder of the Spay-Neuter Assistance Program and served as the medical director for a number of years. Between 2001 and 2008, Dr. Folger served on the Animal Welfare Committee of the AVMA, during which time he created the Feline Welfare Committee of the American Association of Feline Practitioners and wrote the original Unowned, Abandoned and Feral Cat Position Statement for the AVMA. He also served as founding chair of the Feline Welfare Committee for two three-year terms. Dr. Folger has authored several position statements regarding issues concerning feral cats.

After listening to Respondent's testimony (discussed below) and reviewing Tiger's medical records,<sup>68</sup> the November 27, 2014 video taken by Ms. Hemsell, and the photographs admitted into evidence,<sup>69</sup> Dr. Folger concluded that the cat in Respondent's April 15, 2015 photograph was Tiger. Dr. Folger agreed that the April 15, 2015 photograph is of poor quality. Despite this, Dr. Folger said he was able to determine that the cat in the photograph was Tiger because Tiger had distinctive markings, including:

- A band of white fur down his trachea (the throat area) that extended halfway up his cervical area;<sup>70</sup>
- A belt of white fur on his left-hind thigh that extended in a semicircle from the knee to the back part of his leg;<sup>71</sup>
- Rather than a V-shaped stripe going towards each eye, only one stripe going towards his eye on the left side;<sup>72</sup>
- A right atrophied scrotum (a scrotum that does not have a testicle in it) with no scrotal sac on his left side;<sup>73</sup> and
- A flat face indicative of either a neutered male or a female cat.<sup>74</sup>

Dr. Folger explained that while most tabbies have a white stripe down their trachea, the white fur rarely extends halfway up the cat's cervical area. Similarly, it is unusual for a tabby to have a semi-circle belt of white fur around its hind-leg thigh. According to Dr. Folger, "it's kind of like a trademark or logo."<sup>75</sup> Dr. Folger also pointed out that while "almost all" tabby cats

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<sup>68</sup> Staff Ex. 9.

<sup>69</sup> Staff Exs. 1-5, 8.

<sup>70</sup> Tr. Vol. 2 at 11.

<sup>71</sup> Tr. Vol. 2 at 11-12.

<sup>72</sup> Tr. Vol. 2 at 12.

<sup>73</sup> Tr. Vol. 2 at 13.

<sup>74</sup> Tr. Vol. 2 at 13.

<sup>75</sup> Tr. Vol. 2 at 11.

have a V-shaped stripe going towards their eye on both sides, Tiger had only one stripe on the left side, which he deemed “really unusual.”<sup>76</sup>

In Tiger’s medical records, Dr. Folger pointed out an entry made on October 5, 2009, noting that Tiger’s left testicle had not descended into the scrotum.<sup>77</sup> On January 11, 2010, when Tiger was neutered at the Clinic, Terry Wunderlich, D.V.M., recorded that Tiger was 9.1 pounds and “cryptorchid,” meaning one testicle had not descended.<sup>78</sup> Because kittens typically gain a pound per month and Tiger was listed as weighing 9.1 pounds, Dr. Folger opined that Tiger was at least nine months old and fully grown when he was neutered.<sup>79</sup> At nine months of age, Dr. Folger testified, Tiger’s right testicle would have been 1.5 to 2 centimeters, and would have expanded the scrotum on the right side. Although a scrotal sac will get smaller after an adult male cat is neutered, Dr. Folger stated that the scrotal sac will not disappear as it might in the case of a cat neutered as a kitten.<sup>80</sup> According to Dr. Folger, another indication in the medical records that Tiger was fully grown when he was neutered is that he was given “Advantage Multi Cat Purple” in November 2009. Dr. Folger testified that Advantage Multi Cat Purple is an anti-flea/heartworm product for cats over 9 pounds.<sup>81</sup>

Dr. Folger disputed Respondent’s claim that the photograph she took of the cat’s remains evinces an intact male cat. Instead, he testified, the cat in the photo had been neutered and had one atrophied scrotal sac. As visible in Ms. Hemsell’s November 27, 2014 video of Tiger riding on the Gator, Dr. Folger noted, Tiger had an expanded scrotal sac to the right of his prepuce (which Dr. Folger defined as “the skin surrounding the distal end of the penis”), just like the cat in Respondent’s photograph.<sup>82</sup> According to Dr. Folger, Respondent incorrectly identified the more prominent oblong area in her photograph as a testicle. Dr. Folger testified that it was the

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<sup>76</sup> Tr. Vol. 2 at 12.

<sup>77</sup> Staff Ex. 9 at 3.

<sup>78</sup> Staff Ex. 9 at 3.

<sup>79</sup> Tr. Vol. 2 at 15.

<sup>80</sup> Tr. Vol. 2 at 38.

<sup>81</sup> Tr. Vol. 2 at 15.

<sup>82</sup> Tr. Vol. 2 at 12-13, 16-17; Staff Exs. 1-3.

cat's prepuce, not a testicle.<sup>83</sup> He also testified that had the cat Respondent shot been a tomcat, the cat's jowls would have been enlarged. In his opinion, the cat's jowls were not enlarged, but Dr. Folger conceded that the cat's face was tilted away from the camera.<sup>84</sup>

Dr. Folger also rejected Respondent's claim that the cat she shot was a feral cat, with unkempt fur. He noted that a feral cat (which he defined as a cat that has not been socialized by humans by the time it is 24-30 weeks old) is different from an abandoned cat that has been socialized.<sup>85</sup> Typically, a feral cat will not approach a human.<sup>86</sup> The cat in the April 15, 2015 photograph was a well-nourished 9-10 pound cat with a "healthy and well-fledged coat."<sup>87</sup> Based on all of Tiger's distinctive features (as seen in the Facebook photograph and Ms. Hemsell's video), and on his analysis of the photograph of the cat's remains, Dr. Folger concluded that the cat Respondent shot was Tiger.

## **2. Respondent's Evidence**

Respondent and her mother are the only two people who saw the cat that Respondent shot on April 15, 2015. Respondent's mother did not testify and Respondent disposed of the cat shortly after her mother took the photograph of Respondent holding the cat hanging down from the arrow. Respondent later deleted the photograph from her phone. Consequently, the only photograph of the tabby is a copy of the one posted on Respondent's Facebook webpage.

### **a. Respondent's Testimony**

According to Respondent, she had seen three stray cats roam her property: the orange cat, a black and white cat, and a gray female cat. The gray cat, Respondent recalled, was friendly

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<sup>83</sup> Tr. Vol. 2 at 13; Staff Ex. 8A.

<sup>84</sup> Tr. Vol. 2 at 20.

<sup>85</sup> Tr. Vol. 2 at 20.

<sup>86</sup> Tr. Vol. 2 at 23.

<sup>87</sup> Tr. Vol. 2 at 19.

and slept on her porch.<sup>88</sup> Respondent said that the orange cat began roaming around her property two or three weeks prior to April 15, 2015. During that time, the orange cat fought with her cat at least four or five times.<sup>89</sup> The week of April 12, 2015, Respondent said, the orange cat fought with her cat twice, the last time being Monday night (April 13, 2015).<sup>90</sup> The next morning, Respondent spoke to Dr. Buenger, who was her supervisor at the Clinic as well as her landlord. Respondent said she asked Dr. Buenger if he knew who owned the cat, and he said “no,” and told her, “Take care of it.”<sup>91</sup>

Respondent said that she believed the cat was feral because he was roaming outside without a collar;<sup>92</sup> spraying urine on her property; fighting with her cat; and defecating near her horse feed and in the horse-feed buckets.<sup>93</sup> Her horses, she explained, were kept in the pasture west of her home, adjacent to the tree line.<sup>94</sup> Respondent testified that she used to see the orange cat around the horses and on several occasions found cat feces in and around the horse buckets.<sup>95</sup> Every time she saw the orange cat, Respondent stressed, it came from and ran off towards the south—not north towards the Johnsons’ property.<sup>96</sup> Respondent agreed that she did not call Animal Control, try to trap the cat, or ask anyone, aside from Dr. Buenger, to learn if the orange cat was an owned cat.<sup>97</sup>

On the evening of April 15, 2015, Respondent was practicing archery. According to Respondent, she had set up an archery block on the strip of lawn west of her home and close to

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<sup>88</sup> Tr. Vol. 1 at 158.

<sup>89</sup> Tr. Vol. 1 at 125.

<sup>90</sup> Tr. Vol. 1 at 159.

<sup>91</sup> Tr. Vol. 1 at 159.

<sup>92</sup> Tr. Vol. 1 at 174.

<sup>93</sup> Tr. Vol. 1 at 141-42, 159.

<sup>94</sup> Tr. Vol. 1 at 160.

<sup>95</sup> Tr. Vol. 1 at 160.

<sup>96</sup> Tr. Vol. 1 at 142.

<sup>97</sup> Tr. Vol. 1 at 127.

Dr. Buenger's property.<sup>98</sup> The target was located on the north end of the property.<sup>99</sup> Around 7:00 p.m., while practicing with her bow and arrow, she turned and saw an orange cat 20 yards to the south. Within 20 seconds, Respondent fired an arrow at the cat, striking him through the head.<sup>100</sup> Because she had made such a good shot, Respondent asked her mother to take a cellphone photograph of her holding the shaft of the arrow with the cat hanging down.<sup>101</sup> Thirty minutes later, Respondent said, she disposed of the cat in Dr. Buenger's dump pit, south of her home.<sup>102</sup> The cat she killed, Respondent testified, had a "gross appearance," fleas, and a foul smell, and its coat was rough and unkempt.<sup>103</sup>

Until April 15, 2015, Respondent initially agreed, she had never gotten closer than 30 to 40 yards to the orange cat, except to chase him off her porch.<sup>104</sup> Later, she claimed that she had been 20 to 30 yards away.<sup>105</sup> According to Respondent, the orange cat had unkempt hair, weighed about 15 pounds, and was unfriendly.<sup>106</sup> Each time she tried to get near the cat, Respondent stated, "the minute" he saw her, he ran away.<sup>107</sup> Before she killed the cat, Respondent conceded, she could not tell from 20 yards that the cat had fleas or a foul odor.<sup>108</sup>

At 7:51 p.m. that night, Respondent sent Dr. Buenger a text stating, "got rid of tomcat tonight."<sup>109</sup> An hour or two later, Respondent made the Facebook post in issue, but insisted that her comment was intended to be "facetious." When she learned sometime the next day that her post had gone viral and many people thought she had killed Tiger, Respondent deleted her

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<sup>98</sup> Tr. Vol. 1 at 128, 164.

<sup>99</sup> Tr. Vol. 1 at 129; Staff Ex 18; Respondent Ex. 18A.

<sup>100</sup> Tr. Vol. 1 at 130-31, 133.

<sup>101</sup> Tr. Vol. 1 at 132-33.

<sup>102</sup> Tr. Vol. 1 at 135.

<sup>103</sup> Tr. Vol. 1 at 134.

<sup>104</sup> Tr. Vol. 1 at 126.

<sup>105</sup> Tr. Vol. 1 at 145.

<sup>106</sup> Tr. Vol. 1 at 144.

<sup>107</sup> Tr. Vol. 1 at 144.

<sup>108</sup> Tr. Vol. 1 at 146.

<sup>109</sup> Staff Ex. 6.

Facebook post and returned to the dump pit to take a photograph of the cat's genitals to show that she had killed an intact male cat. Respondent only took one photograph because animals had already eaten portions of the dead cat.<sup>110</sup> Contrary to Dr. Folger's testimony, Respondent said that a tabby cat with Tiger's markings is not unusual, and represented that she found photographs of several such cats within a matter of minutes in an internet search.<sup>111</sup>

Respondent said it never occurred to her that the cat could be the Johnsons' pet because the Johnsons' house was too far away to even be visible from her home.<sup>112</sup> Respondent agreed that even after she learned that others believed the cat she killed was Tiger, she did not contact the Johnsons or return the remains to them for burial. She also agreed that she did not take the remains to the police.<sup>113</sup> She explained that she was "told to get an attorney and not to speak" to anyone, so she felt she "wasn't in a position to go talk to the Johnsons."<sup>114</sup>

**b. Testimony of Paul Smith, D.V.M.**

Dr. Smith, Respondent's expert, has been a licensed veterinarian in Texas for 47 years and runs a general small animal practice in Houston, Texas.<sup>115</sup> He knows Respondent because she covered his practice for a few days in June 2015 while he was on vacation.<sup>116</sup>

Regarding Respondent's photograph of the cat's remains, Dr. Smith agreed the photograph is blurry and stated that he cannot verify "anything from that photo."<sup>117</sup> He testified that because there is only one view of the cat's genital area there is "no way to be 100 percent sure" that it was a tomcat. To make a definitive determination, Dr. Smith said he would need to

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<sup>110</sup> Tr. Vol. 1 at 137; Staff Ex. 8.

<sup>111</sup> Tr. Vol. 2 at 131-32.

<sup>112</sup> Tr. Vol. 1 at 162.

<sup>113</sup> Tr. Vol. 1 at 140-41.

<sup>114</sup> Tr. Vol. 1 at 140-41.

<sup>115</sup> Tr. Vol. 2 at 105.

<sup>116</sup> Tr. Vol. 2 at 119.

<sup>117</sup> Tr. Vol. 2 at 118.

review three or four views of the genital area.<sup>118</sup> Based on what he could see in the photograph, Dr. Smith testified that it looks “like a tomcat with a penis and testicles below it there.”<sup>119</sup>

### 3. ALJs’ Analysis

The parties disagreed sharply as to whether the photograph of the remains indicated a neutered or an intact male cat. The operative question, however, is whether the cat was Tiger.

The ALJs find that the most relevant and reliable evidence of the cat’s identity is the marked similarity between the attributes of the cat in the Facebook photograph and the cat in Ms. Hemsell’s video. As Dr. Folger convincingly testified, the physical patterns on the fur of both cats are strikingly similar. Although orange tabby cats are common cats and there were other orange-and-white cats in the neighborhood, the ALJs are persuaded that the cat was Tiger by the close resemblance between the two cats with respect to the band of white fur down the trachea extending halfway up the cervical area, the belt of white fur on the left-hind thigh extending in a semicircle from the knee to the back part of the leg, and the single stripe going towards the eye on the left side. Importantly, the persons most familiar with Tiger’s markings—the Johnsons and Ms. Hemsell—immediately recognized Tiger in the Facebook photograph based on these very attributes. Tiger also went missing at about the same time as the photograph was taken, and has not been seen since.

The evidence concerning the similarity (or lack thereof) between Tiger’s genitalia as seen in Ms. Hemsell’s video and the remains in Respondent’s second photograph is less conclusive. The video illustrates Tiger standing on the front of the Gator and occasionally moving forward so that his tail and rear are visible. Tiger’s tail is raised, and some scrotal skin is visible between his legs. However, it is not possible to determine whether the remains in the photograph consist of a prepuce and an atrophied right scrotal sac (as identified by Dr. Folger) or of two intact testicles (as claimed by Respondent). The ALJs give little weight to either party’s evidence

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<sup>118</sup> Tr. Vol. 2 at 106

<sup>119</sup> Tr. Vol. 2 at 106.



regarding the photograph of the remains, but find a preponderance of the evidence establishes that the cat shot by Respondent on April 15, 2015, was Tiger.

**B. Whether Respondent Acted without Effective Consent of the Owner**

The offense of animal cruelty under Texas Penal Code § 42.092(b)(2) requires a showing that the person acted without “the owner’s effective consent.” Respondent testified that she made an attempt to ascertain the ownership of the cat that began visiting her property in late March and early April 2015. She rented her house from one of the Clinic’s owners, Dr. Buenger, who lived on an adjoining property.<sup>120</sup> On April 14, 2015, Respondent told Dr. Buenger that she was having problems with an orange tomcat that was fighting with her pet cat, and who, she suspected, was defecating in and around her horses’ feed troughs.<sup>121</sup> Respondent asked Dr. Buenger if he had seen “an orange, feral tomcat running around,” and Dr. Buenger said he recalled seeing the cat before, but he had not experienced any problems with it.<sup>122</sup>

Respondent then asked Dr. Buenger if the cat belonged to him, or if he knew whether it belonged to anyone else in the neighborhood. Dr. Buenger answered “No” to both questions.<sup>123</sup> Respondent queried Dr. Buenger as to what she should do with the cat. According to Respondent, Dr. Buenger responded, “Take care of it.”<sup>124</sup> Respondent testified that she understood Dr. Buenger’s comment to mean, “Get rid of it.”<sup>125</sup> Respondent opined that Dr. Buenger would not have meant that she should capture, neuter, and release the tomcat, because Dr. Buenger had previously made statements “about the fact that he didn’t need feral cats running around.”<sup>126</sup> Veterinary technician Karen Chapman witnessed the exchange between

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<sup>120</sup> Tr. Vol. 1 at 123-24.

<sup>121</sup> Tr. Vol. 1 at 125-26.

<sup>122</sup> Tr. Vol. 1 at 158-59.

<sup>123</sup> Tr. Vol. 1 at 125-26.

<sup>124</sup> Tr. Vol. 1 at 159.

<sup>125</sup> Tr. Vol. 1 at 163.

<sup>126</sup> Tr. Vol. 1 at 163.

Respondent and Dr. Buenger and testified that she, too, understood Dr. Buenger to mean “shoot the cat” when he said “Take care of it.”<sup>127</sup>

Given that her house was Dr. Buenger’s “rental property, something that he owned,” Respondent specifically asked Dr. Buenger what to do about the feral cat, with the “intent to get permission to take care of an issue at [her] house.”<sup>128</sup> Respondent said it did not occur to her that the Johnsons might be the cat’s owners because of the distance between her house and the Johnsons’ property.<sup>129</sup> Moreover, she had always noticed that the cat approached her house from the south, which was the opposite direction from the Johnsons’ property (located to the north of Respondent’s house).<sup>130</sup> She added that the cat’s behaviors, such as spraying urine and fighting with her cat, in addition to the cat being intact rather than neutered, led her to believe the cat was not a domestic cat or someone’s pet.<sup>131</sup>

Respondent acknowledged that an owner may decide not to neuter a pet cat, and even neutered cats will fight and spray urine. She admitted that she did not take additional steps to find out whether the cat that was causing trouble at her house was owned by anyone. She did not: ask any of her neighbors, other than Dr. Buenger, whether they owned the cat; attempt to use a humane trap; call Animal Control; or take other non-lethal actions.<sup>132</sup> She also did not ask Dr. Wunderlich, the other owner of the Clinic and the veterinarian who focused most on small animals, whether he knew of a similar cat owned by a neighbor or a client of the Clinic.<sup>133</sup>

Based on statements Ms. Johnson made to a Sheriff’s Deputy during the criminal investigation, Respondent suggested that an owner gives effective consent to another person to

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<sup>127</sup> Tr. Vol. 2 at 92.

<sup>128</sup> Tr. Vol. 1 at 164.

<sup>129</sup> Tr. Vol. 1 at 162.

<sup>130</sup> Tr. Vol. 1 at 142-43.

<sup>131</sup> Tr. Vol. 1 at 141-42.

<sup>132</sup> Tr. Vol. 1 at 126-27.

<sup>133</sup> In her deposition, Respondent stated that the first time she discussed the cat with Dr. Wunderlich was April 16, 2015, the day after she shot it. Staff Ex. 10 at 44.

kill an owned animal that strays onto and damages the person's property.<sup>134</sup> Ms. Johnson testified to her belief that Respondent "has the right to protect her pets and her property," and said that "if Tiger was doing bad things to her property[, ] I would be very sorry for that."<sup>135</sup>

Texas Penal Code § 42.092 does not define "effective consent of the owner." However, Texas Penal Code § 1.07, which lists definitions to be used "in this code," defines "effective consent" to include "consent by a person legally authorized to act for the owner."<sup>136</sup> Consent is defined as "not effective" if, among other things, it is induced by force, threat, or fraud, or is given "by a person the actor knows is not legally authorized to act for the owner."<sup>137</sup>

Respondent asserts that Dr. Buenger's permission to "take care of" the cat was sufficient because he owned the property onto which the cat had strayed. However, Respondent knew that Dr. Buenger was not the owner of the cat. She had no reason to believe Dr. Buenger was authorized to give permission on behalf of the cat's owner. Ms. Johnson's statement to law officers—which was made *after* Tiger had been killed—did not give Respondent (or anyone else) permission to kill an owned cat, or change the law requiring effective consent of an owner.

Respondent also suggested that a feral cat does not have an owner, and thus no permission is required. But, because the preponderance of evidence established that the cat Respondent killed was Tiger, an owned cat, effective consent of the owner was required before Respondent could kill or injure the cat under Texas Penal Code § 42.092(b)(2).

Respondent made very limited efforts to determine whether the cat had an owner. The preponderance of the evidence establishes that Respondent acted without the effective consent of the cat's owner when she shot the cat.

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<sup>134</sup> Respondent's Closing Argument at 16.

<sup>135</sup> Tr. Vol. 1 at 68-70.

<sup>136</sup> Tex. Penal Code § 1.07(19).

<sup>137</sup> Tex. Penal Code § 1.07(19)(A)-(B).

**C. Whether Respondent's Conduct was Intentional, Knowing, or Reckless**

Section 6.03 of the Texas Penal Code provides definitions of culpable states of mind. A person acts intentionally when “it is his conscious objective or desire to engage in the conduct or cause the result.”<sup>138</sup> An actor acts with knowledge when he “is aware of the nature of his conduct or that the circumstances exist” and he acts with knowledge of the result when he “is aware that his conduct is reasonably certain to cause the result.”<sup>139</sup> Reckless conduct is exhibited when a person “is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur.”<sup>140</sup> The risk “must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor’s standpoint.”<sup>141</sup>

Staff argued that Respondent’s conduct was: intentional, because she intended to shoot the cat; knowing, because she was aware that she had no permission from the cat’s owner; and reckless, because she was aware of the risk the cat was owned.<sup>142</sup> Respondent testified that, had she known the cat she shot was a pet—whether it belonged to the Johnsons or to someone else—she never would have shot it.<sup>143</sup> She described the events of April 15, 2015, as follows. She was outside her house, practicing archery on her target blocks, when she turned and noticed an orange cat standing about 20 yards away and “looking right at [her].”<sup>144</sup> Within “20 seconds of seeing the cat,” Respondent took aim and shot an arrow at the cat’s head.<sup>145</sup>

Respondent said she placed the shot based on her experience with hunting, which she has done since she was 10 years old, and her knowledge of “good kill shots versus not-so-good kill

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<sup>138</sup> Tex. Penal Code § 6.03(a).

<sup>139</sup> Tex. Penal Code § 6.03(b).

<sup>140</sup> Tex. Penal Code § 6.03(c).

<sup>141</sup> Tex. Penal Code § 6.03(c).

<sup>142</sup> Staff’s Closing Argument at 14-15.

<sup>143</sup> Tr. Vol. 1 at 146-47, 174.

<sup>144</sup> Tr. Vol. 1 at 182.

<sup>145</sup> Tr. Vol. 1 at 130.

shots.”<sup>146</sup> She agreed that if her shot had deviated even an inch from its intended placement, the arrow could have missed the cat’s brain and resulted in pain and suffering if the cat survived.<sup>147</sup> Respondent reiterated that she was not worried about this outcome because she “felt comfortable in having a good shot.”<sup>148</sup>

Respondent acknowledged that an orange tabby is a “very common cat” and there “absolutely” could be more than one such cat in the neighborhood.<sup>149</sup> She expressed confidence that the cat she shot was the same one she had seen before because she “had seen him multiple times, and he came from the same area, and [she] recognized him.”<sup>150</sup>

The ALJs conclude, based on the evidence presented, that Respondent intended to shoot and kill what she believed was the feral cat that had been a nuisance at her property over the previous weeks. Respondent testified that she was confident in her abilities to identify and execute a “good kill shot,” indicating that she knew her conduct was reasonably certain to cause the result of killing the cat.

With respect to whether Respondent intentionally and knowingly shot an owned cat, the ALJs find the evidence lacking. Respondent testified persuasively that she believed the cat she was aiming at to be the feral tomcat, and that she would not have taken the shot if she thought the cat was owned. Her subjective belief was that she was shooting a feral tomcat and that she had the permission she needed (from Dr. Buenger).

However, the ALJs find that Respondent’s conduct was reckless. Respondent made minimal efforts to ascertain the ownership of the cat, leaving open the possibility that the cat belonged to a neighbor. Orange tabbies are very common cats, and Respondent acted so quickly that she did not verify that the cat in front of her was the same feral cat she had seen before. At a

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<sup>146</sup> Tr. Vol. 1 at 181.

<sup>147</sup> Tr. Vol. 1 at 181-82.

<sup>148</sup> Tr. Vol. 1 at 182.

<sup>149</sup> Tr. Vol. 1 at 144.

<sup>150</sup> Tr. Vol. 1 at 144-45.

distance of 20 yards, Respondent could not verify the cat's gender, or that the cat had fleas, a bad odor, or a mangy coat like the cat she had seen on her porch.<sup>151</sup> An ordinary person who was exercising care would have taken the precaution of double-checking the facts before taking a kill shot at an animal that might be a pet. Accordingly, the ALJs find that Respondent recklessly killed an animal without the owner's effective consent.

**D. Whether Respondent had a Valid Defense under Penal Code § 42.092**

Staff alleges that Respondent's conduct amounted to a violation of Texas Penal Code § 42.092(b)(2). Therefore, Respondent is entitled to raise any defenses available against a prosecution under that provision. Respondent asserted the defenses of wildlife or depredation control pursuant to Texas Penal Code § 42.092(f)(1)(B), and justification pursuant to Texas Penal Code §§ 9.02 and .21.

**1. Depredation**

A defense under Texas Penal Code §42.092(f)(1)(B) may be asserted if the person's conduct is considered to be "generally accepted and otherwise lawful . . . wildlife management, wildlife or depredation control, or shooting preserve practices as regulated by state and federal law."<sup>152</sup> Texas Penal Code § 42.092(a)(5) directs that depredation "has the meaning assigned by Section 71.001, Parks and Wildlife Code." That section of the Parks and Wildlife Code defines depredation as "the loss of or damage to agricultural crops, livestock, poultry, wildlife, or personal property."

On its face, it appears that Texas Parks and Wildlife Code § 71.001 could be applied to treat as "depredation" the cat feces Respondent discovered in her horse troughs and the risk to her pet cat from the feral tomcat's attacks. However, a closer reading of chapter 71 of the Parks and Wildlife Code shows that its provisions relate to depredation by "fur-bearing animals,"

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<sup>151</sup> Tr. Vol. 1 at 146.

<sup>152</sup> Tex. Penal Code § 42.092(f)(1)(B).

which are not defined to include cats. Specifically, § 71.004 forbids a person from taking, selling, purchasing, or possessing a fur-bearing animal “except as provided by proclamation of the [Parks and Wildlife] Commission.” In the absence of a proclamation, a landowner or his agent is not prohibited from “taking a fur-bearing animal causing depredation on that person’s land.”<sup>153</sup> “Fur-bearing animal” has a limited definition and applies to “wild beaver, otter, mink, ring-tailed cat, badger, skunk, raccoon, muskrat, opossum, fox, or nutria.”<sup>154</sup> Cats, whether feral or owned, are not included as predators covered by this provision. Therefore, the ALJs find Respondent did not have a valid defense of depredation pursuant to Texas Penal Code § 42.092(a)(5) and Texas Parks and Wildlife Code § 71.001. In addition, the evidence does not support a finding that the orange cat, rather than the other two strays roaming Respondent’s property, was responsible for the feces found around the horse feed.

In her written closing argument, Respondent pointed out that Texas Penal Code § 42.092(f)(1)(B) lists “wildlife management” separately from depredation control, and the term “animal” in Texas Penal Code § 42.092(a)(2) excludes “an uncaptured wild living creature.” The plain language of Texas Penal Code § 42.092 contradicts Respondent’s position. An animal is a “domesticated living creature” and includes “any stray or feral cat or dog.”<sup>155</sup> Thus, the ALJs are not persuaded that feral cats are encompassed by “wildlife management.” Moreover, shooting feral cats with a bow and arrow is not a “generally accepted and otherwise lawful” method of wildlife management. Respondent herself testified that while a bow and arrow was “an efficient way” to kill the cat, it was not “an appropriate way.”<sup>156</sup> Ultimately, the appropriate manner of killing a feral cat is beside the point, because the cat killed was Tiger, an owned cat.

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<sup>153</sup> Tex. Parks & Wild. Code § 71.004(a).

<sup>154</sup> Tex. Parks & Wild. Code § 71.001(1).

<sup>155</sup> Tex. Penal Code § 42.092(a)(2).

<sup>156</sup> Tr. Vol. 1 at 147.

## 2. Justification

The defense of justification may apply if a person “reasonably believes the conduct is required or authorized by law.”<sup>157</sup> Respondent described her experience growing up in rural north central Wyoming, where feral cats were seen as a nuisance.<sup>158</sup> Families living in rural Wyoming lacked the time and funds to trap, neuter, and care for feral cats, and that state faces “a big issue with [feral cat] population control,” according to Respondent.<sup>159</sup> Respondent cited Wyoming law that defines a “predatory animal” to include “coyote, jackrabbit, porcupine, raccoon, red fox, skunk, or stray cat”<sup>160</sup> and states that “predatory animals . . . may be taken without a license in any manner and at any time,” subject to limited exceptions.<sup>161</sup>

Wyoming law as cited by Respondent appears to permit the killing of a stray cat in any manner and at any time, including Respondent’s use of a bow and arrow to kill what she believed to be a feral cat on her property. Also, Respondent was living in a rural community in Texas, where she was aware that other residents used deadly force to kill feral cats. However, Respondent last lived in Wyoming in 2008, or approximately seven years before the incident at issue here.<sup>162</sup> For almost three years immediately prior to the incident, Respondent lived in Texas.<sup>163</sup> She had an obligation to know and comply with Texas law, which does not permit the killing of an owned cat without the owner’s permission.

Thus, the ALJs find that Respondent cannot establish the defense of justification under Texas Penal Code § 9.21(a). Also, although Respondent did not directly raise the defense of

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<sup>157</sup> Tex. Penal Code § 9.21(a).

<sup>158</sup> Tr. Vol. 1 at 148, 150-51.

<sup>159</sup> Tr. Vol. 1 at 150-51.

<sup>160</sup> Wyo. Stat. § 23-1-101(a)(viii)(A).

<sup>161</sup> Wyo. Stat. § 23-3-103(a). The exceptions listed in the Wyoming statute are not relevant to this discussion. For example, Wyoming law does not allow the taking of any wildlife with “any fully automatic weapon,” a limitation that does not apply under the facts of this case. Wyo. Stat. § 23-3-112(a).

<sup>162</sup> Respondent testified that she began veterinary school in Colorado in 2008 and graduated in 2012.

<sup>163</sup> Respondent held an equine medicine internship in Weatherford, Texas, from June 2012 to June 2013. She began working at the Clinic in July 2013.



ignorance of the law, that defense is unavailable. Texas Penal Code § 8.03(a) states the general rule that it is no defense to prosecution that an actor was ignorant of a law after the law took effect. An affirmative defense is available if the actor reasonably believed the conduct did not constitute a crime *and* he reasonably relied on an official statement of the law issued by an authorized person or body. Evidence of those circumstances is not found in this case.

#### **E. ALJs' Analysis**

The Board may discipline a licensee under Act § 801.402(4) if the licensee engages in dishonest or illegal practices in or “connected with” the practice of veterinary medicine. Sanctions are available under Act § 801.402(6) for a licensee’s practices or conduct that violates the Board’s Rules of Professional Conduct. In this case, Staff cited Board Rule 573.4, which is a rule of professional conduct authorizing discipline based on conduct committed while in the practice of or “under the guise of the practice of” veterinary medicine.

With respect to Act § 801.402(4), Board Rule 575.50(f)(5)(J) states that a felony or misdemeanor offense involving animal cruelty is a crime that relates to and is “connected with the practice of veterinarians,” because such conduct “indicates a violation of the public trust, and a lack of integrity and respect for one’s fellow human beings and the community at large.” As previously stated, the ALJs do not address Respondent’s argument that a criminal conviction is required before the Board may impose a disciplinary sanction.

Based on the analysis above, Respondent’s actions met all of the elements required for a prosecution under Texas Penal Code § 42.092(b)(2) because she killed a pet cat without the owner’s effective consent, her conduct recklessly ignored the risk the cat had an owner, and she cannot raise any of the defenses permitted under the statute.<sup>164</sup> Animal cruelty is defined by the Board to be “connected with the practice of veterinarians.” Therefore, a plain reading of the

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<sup>164</sup> This analysis applies the “preponderance of the evidence” standard of proof that appears to be invoked by Board Rule 573.4, rather than the “beyond a reasonable doubt” standard that would apply in the criminal context.

statute and Board Rules indicates that Respondent is subject to discipline for a violation of Act § 801.402(4).

Whether Respondent is subject to sanction pursuant to Act § 801.402(6) (for violation of a rule of professional conduct, *i.e.*, Board Rule 573.4), is a closer question. Board Rule 573.4 states that conduct amounting to a criminal offense is sufficient for disciplinary action, with or without a complaint, indictment, or conviction, if there is “proof of the commission of the act while in the practice of, or under the guise of the practice of . . . veterinary medicine.” The “practice of veterinary medicine” is defined as follows in Act § 801.002(5):

- (A) the diagnosis, treatment, correction, change, manipulation, relief, or prevention of animal disease, deformity, defect, injury, or other physical condition, including the prescription or administration of a drug, biologic, anesthetic, apparatus, or other therapeutic or diagnostic substance or technique;
- (B) the representation of an ability and willingness to perform an act listed in Paragraph (A);
- (C) the use of a title, a word, or letters to induce the belief that a person is legally authorized and qualified to perform an act listed in Paragraph (A);  
or
- (D) the receipt of compensation for performing an act listed in Paragraph (A).

Staff conceded that Respondent was not actually using any veterinary training or expertise in killing the cat with a bow and arrow, and she did not provide veterinary services to the animal.<sup>165</sup> The killing of the cat does not fall within the definition of the practice of veterinary medicine. Thus, the question is whether Respondent’s conduct was committed under the guise of the practice of veterinary medicine.

The “guise of the practice” of veterinary medicine is not defined. However, Respondent’s own words linked her action (shooting what she believed was a feral tomcat) to the practice of veterinary medicine. She captioned the Facebook photograph with a statement, “Vet

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<sup>165</sup> Staff’s responses to Respondent’s Requests for Admission are contained in Respondent’s Exhibit 25.

of the year award . . . gladly accepted” that, while meant to be facetious, directly referenced her profession. As a result, thousands of complaints were sent to the Board, which regulates the veterinary profession in Texas. The number of complaints and the nature of public sentiment are not determinative factors in this proceeding, but they illustrate that a connection to veterinary medicine was readily recognized by persons who viewed the Facebook photograph. Respondent admitted that her caption for the Facebook photograph was facetious because she understood that it was “not the type of thing people would expect a veterinarian to do.”<sup>166</sup>

Respondent’s conduct caused her to be fired by the Clinic. Dr. Buenger stated in an email termination notice to Respondent that her conduct was “totally contrary to the heart and soul of our practice at Washington Animal Clinic” and had caused “enormous harm to our reputation in a mere 24 hours.”<sup>167</sup> Actions unrelated to veterinary medicine (for example, shoplifting or arson) by a veterinary professional could also cause reputational damage. However, the harm to Respondent’s employer was intrinsically related to the fact that the Clinic was where she practiced, and she linked killing the cat to being “Vet of the year.” The ALJs conclude that Respondent’s conduct was connected to veterinary medicine and performed under the guise of the practice of veterinary medicine.

## V. ANALYSIS OF DISCIPLINARY SANCTION

Factors the Board must consider in assessing sanctions or penalties are found in Board Rule 575.25. Factors that weigh in Respondent’s favor are discussed in Section V.A, and aggravating factors are discussed in Section V.B.

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<sup>166</sup> Tr. Vol. 1 at 35.

<sup>167</sup> Staff Ex. 7.

**A. Mitigating Factors****1. Seriousness of the Violation, including Nature, Circumstances, Extent and Gravity of Prohibited Acts****a. Tiger died Instantaneously and without Suffering**

The parties disagreed as to whether Tiger was alive at the time the Facebook photograph was taken. Whether the cat died instantaneously is not determinative of whether Respondent committed animal cruelty under Texas Penal Code § 42.092(b)(2). But, as discussed below, it is relevant to mitigation, because Respondent took care to position and deliver the shot based on her extensive experience as a hunter and her knowledge of how to place a kill shot without causing undue suffering to an animal.

Dr. Folger testified that he believed the cat in Respondent's Facebook post was still alive at the time the picture was taken. He said it is possible for a cat to be struck in the head with an arrow and survive.<sup>168</sup> He cited a "famous case" in the literature in which an arrow struck a cat in the head but did not penetrate the brain case, and the cat "was on the exam table with an IV catheter and perfectly awake."<sup>169</sup> Dr. Folger noted that in the Facebook post, the cat's "elbows" and "the right rear leg" are "flexed," which "requires an intact neuromuscular system."<sup>170</sup> The cat's front right paw is "pronated," or "turned medially towards the midpoint of the body so that you can see the underside of the paw."<sup>171</sup> That type of motion, he opined, is a "really complex motor function in a cat" and requires that that cat's neuromuscular system be intact.

The first time he saw the April 15, 2015 photograph, Dr. Folger said, he assumed the position of the cat's body was due to "postmortem changes and the onset of rigor mortis."<sup>172</sup>

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<sup>168</sup> Tr. Vol. 2 at 25.

<sup>169</sup> Tr. Vol. 2 at 61.

<sup>170</sup> Tr. Vol. 2 at 25.

<sup>171</sup> Tr. Vol. 2 at 26.

<sup>172</sup> Tr. Vol. 2 at 26-27.

However, when he heard Respondent testify at hearing that the photograph was taken five to ten minutes after she shot the cat, he realized that it could not be rigor mortis, which does not start “until 30 minutes after the cat is dead,” and would still take about two hours to fix the cat’s position.<sup>173</sup> Given the flexing of the cat’s elbows and the pronation of the front right paw, Dr. Folger determined that the cat did not die instantly and may have suffered some pain.<sup>174</sup>

On cross-examination, Dr. Folger conceded that the Facebook photograph is not clear enough to determine whether the cat’s rear right leg was flexed or was actually partly propped on a branch of the surrounding greenery.<sup>175</sup> He agreed that the arrow appeared to enter one side of the cat’s head and exit at another point, but opined that the arrow actually “went [in] above the eye and on the side of the head” to the “lateral part of the eye.”<sup>176</sup> Dr. Folger said that was the “only way to explain why the cat still has neuromuscular function.”<sup>177</sup>

Respondent testified that the cat was dead within seconds, well before she asked her mother to take the photograph (5 to 10 minutes after she shot the cat).<sup>178</sup> She said she examined the cat to confirm he was dead by checking for a heartbeat and a corneal reflex.<sup>179</sup>

The bow Respondent used has a “50-pound draw,” which she explained refers to a kinetic energy equation that estimates the weight and speed required for an arrow to efficiently kill an animal of a given size.<sup>180</sup> A person seeking a license to shoot large game animals such as elk must, in most states, be able to wield a bow with a 40-pound draw, Respondent testified.<sup>181</sup> The arrow that Respondent used had a “field tip” that is commonly used for practice but can also be

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<sup>173</sup> Tr. Vol. 2 at 26-27.

<sup>174</sup> Tr. Vol. 2 at 26-28.

<sup>175</sup> Tr. Vol. 2 at 34.

<sup>176</sup> Tr. Vol. 2 at 53-54.

<sup>177</sup> Tr. Vol. 2 at 53.

<sup>178</sup> Tr. Vol. 1 at 133-34.

<sup>179</sup> Tr. Vol. 1 at 134.

<sup>180</sup> Tr. Vol. 1 at 186.

<sup>181</sup> Tr. Vol. 1 at 186.

used to kill small game such as rabbits and squirrels.<sup>182</sup> Based on her experience hunting since she was 10 years old and her knowledge of the lethality of the bow and arrow, Respondent said the cat died “instantaneously” after being shot.<sup>183</sup>

Respondent also said that she knew the arrow had gone through the cat’s brain and caused instant death because, if it had not pierced the skull completely, she would not have been able to hold just the arrow with the cat hanging down from it as shown in the photograph. The weight of the dead cat would have been too great and the cat’s body would have tilted to the side, Respondent explained.<sup>184</sup> She added that the cat’s body was limp, and, if it appeared in the photograph to have flexed limbs, that would be because the legs were partly propped on branches of the shrubbery.<sup>185</sup>

Respondent’s expert Dr. Smith, who has hunted with a bow and arrow in the past, testified that the cat shown in Respondent’s Facebook photograph was dead at the time the picture was taken. He stated that if the cat had been alive, it would have been “thrashing around and trying to claw you.”<sup>186</sup> Based on his experience as a bow hunter and veterinarian, Dr. Smith testified that the cat died instantly.<sup>187</sup> Dr. Smith said that he once shot dead a mule deer with a bow and arrow at 20 yards and noted that the arrows are “lethal” and if “you stick an arrow through anything like that, it’s not going to live.”<sup>188</sup>

In Dr. Smith’s opinion, the “angle of the arrow, where the arrow went in and where the arrow came out, it’s got to be through the cranium,” and “there’s no way that cat is going to live with an arrow through the cranium like that.”<sup>189</sup> He added that, for Respondent to be able to hold

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<sup>182</sup> Tr. Vol. 1 at 186.

<sup>183</sup> Tr. Vol. 1 at 133.

<sup>184</sup> Tr. Vol. 2 at 76.

<sup>185</sup> Tr. Vol. 2 at 76-77.

<sup>186</sup> Tr. Vol. 2 at 107.

<sup>187</sup> Tr. Vol. 2 at 108.

<sup>188</sup> Tr. Vol. 2 at 108.

<sup>189</sup> Tr. Vol. 2 at 107, 120.

the arrow and have the cat dangle from it, the arrow necessarily would have gone through an area where it would “have something of substance holding it” rather than mere skin.<sup>190</sup> But, he conceded, there is no way to tell with absolute certainty from the photograph exactly where the arrow went through the cat’s head because only one side of the cat is showing.<sup>191</sup>

The ALJs find persuasive the testimony of Respondent and Dr. Smith that an arrow shot from a bow with a 50-pound draw that enters one side of a cat’s head and exits the other is extremely likely to cause instantaneous death. In the photograph, Respondent was gripping only the arrow and was not directly supporting the cat otherwise, indicating that the arrow went through the skull and the skull was helping to keep the cat’s body on the arrow. The ALJs agree with Dr. Smith and Respondent that the position of the cat’s head and body with respect to the arrow would be tilted, different than what is shown, had the arrow not pierced the skull. The ALJs note also that the features Dr. Folger observed and described as indications of an intact neuromuscular system (the position of the legs and front right paw) may be attributed to the limbs resting on the greenery.

As discussed above, Respondent acted recklessly in shooting the cat because she did not take reasonable steps to ascertain that the cat did not have an owner or that the cat she shot was, in fact, the cat that had been causing trouble at her property. However, Respondent’s conduct was spontaneous, and the evidence indicates this is an isolated incident, not part of a pattern or indicative of a predilection to harm animals. Respondent is a skilled and experienced hunter. Tiger died instantaneously and there is no indication that he suffered.

**b. Tiger’s Owners Support a Sanction less than Revocation**

Tiger’s death caused grief and pain to Mr. and Ms. Johnson as well as Ms. Hemsell, all of whom had known and become attached to him. Despite the gravity of the incident, the Johnsons

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<sup>190</sup> Tr. Vol. 2 at 107-08.

<sup>191</sup> Tr. Vol. 2 at 118.

expressed the opinion that Respondent had made a mistake and had suffered greatly for it by losing her job and enduring the flood of vitriolic public opinion.

Mr. Johnson testified that, as a professional (an attorney) himself, he “felt some empathy” for Respondent and thought that she “punished herself enough already” by facing the negative public onslaught from her Facebook posting.<sup>192</sup> He added that “everybody makes mistakes” and it would not have made him feel better to press charges against Respondent.<sup>193</sup> Ms. Johnson said Respondent “is very young [and committed] a very immature and stupid act,” and noted that she and her husband wanted Respondent to have a “character-building and growing experience” from the incident.<sup>194</sup> When time passed and there was no communication from Respondent expressing remorse or offering to return Tiger’s remains for burial, Ms. Johnson grew more upset and decided to file a complaint with the Board.<sup>195</sup>

The ALJs find persuasive Respondent’s testimony that, if she had known the orange cat was someone’s pet, she never would have shot it. Respondent was sincere in saying that she did not reach out to the Johnsons after learning that the cat was believed to be Tiger because her attorney told her not to speak to anyone.

The final authority concerning Respondent’s discipline belongs to the Board, and not to the Johnsons or to the public. However, it is relevant to note that both of Tiger’s owners felt that Respondent could learn from her mistake and build her character as a result. Under these circumstances, the ALJs are recommending sanctions that will permit Respondent to rejoin her profession and prove her fitness to continue practicing.

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<sup>192</sup> Tr. Vol. 1 at 92.

<sup>193</sup> Tr. Vol. 1 at 92.

<sup>194</sup> Tr. Vol. 1 at 206.

<sup>195</sup> Tr. Vol. 1 at 76.



**2. Hazard or Potential Hazard to Public Health, Safety, or Economic Welfare**

The record does not show that Respondent caused a hazard or risk to public health, safety, or economic welfare. Respondent acted in the belief that she was legally shooting a feral, unowned cat that had been a nuisance. No other animal, person, or property was at risk.

**3. Economic Harm to Property or the Environment**

Respondent's shooting of Tiger caused emotional harm to the Johnsons and Ms. Hemsell, but there is no evidence of economic harm to property or the environment.

**4. History of Previous Violations**

Respondent's case was presented to a grand jury in Austin County that considered the charge of Cruelty to Non-Livestock Animals under Texas Penal Code § 42.092(b)(2) and returned a Notice of No-Bill, ending the criminal prosecution. Over a year has elapsed since the day Respondent shot the cat, and there is no evidence of misconduct, whether civil or criminal, by Respondent in that time period. Respondent has no prior disciplinary history with the Board.

**5. Deterrence**

The ALJs find that the firestorm of public condemnation directed toward Respondent, as well as her loss of employment and inability to find work in the profession, has served as considerable deterrence, and she is very unlikely to engage in similar reckless behavior in the future without consideration of how it will reflect on herself and the profession.<sup>196</sup> Respondent's case is widely known in the veterinary community as well as among members of the general public, and it is reasonable to infer that other veterinarians also have been deterred from questionable methods of dealing with cats they suspect are feral.

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<sup>196</sup> Tr. Vol. 1 at 179-80.

Respondent's specialty is equine medicine, and she is not likely to encounter many small animals in her practice. Even if she does treat small animals, there is no evidence that she has intentionally abused or neglected companion animals. The ALJs find that revocation of Respondent's license is not necessary to achieve the goal of deterrence.

## **6. Other Matters that Justice may Require**

The ALJs find that the evidence supports imposition of a sanction less severe than that requested by Staff (revocation) based on a consideration of the mitigating factors set forth above, as well as: Respondent's genuine (though mistaken) belief that she was legally defending her property; her strong academic and work history; the attitude toward feral cats in the rural communities in which Respondent grew up and lived; the disagreement within the veterinary profession itself concerning treatment of feral cat populations; and evidence of Respondent's love for animals.

### **a. Defense of Property**

Respondent had a sincere belief that the orange cat she saw on April 15, 2015, was the same cat that had been fighting with her cat and defecating around her horses' feed trough. Respondent also believed that she had gotten permission to dispatch the cat from Dr. Buenger, who was her mentor, a fellow veterinarian, and the owner of the property on which the cat was causing trouble. Respondent testified credibly that if she had known the cat was owned she never would have shot at it. Her subjective beliefs do not diminish her responsibility for her actions, but they demonstrate that she acted without intending to cause harm to an owned cat or its owner, and she believed she was defending the property on which she lived.

### **b. Academic and Work History**

Respondent earned a full scholarship for her undergraduate education at the University of Wyoming, and graduated at the top of her class. Throughout college, she worked at the Wyoming State Veterinary Lab, where she participated in testing tissue samples for regulated

diseases such as brucellosis.<sup>197</sup> She took out student loans in the amount of \$150,000 for her veterinary education.<sup>198</sup> Immediately after she received her D.V.M. degree, Respondent was accepted into a one-year equine medicine internship, and was offered a permanent job with Equine Sports Medicine & Surgery in Weatherford, Texas, when she completed the internship.<sup>199</sup> Respondent then worked at the Clinic for two years without any incident and without complaints about her treatment of animals, whether small or large.

After the Clinic terminated her employment, Respondent described herself as “unemployable” because no clinic wants to employ someone who has been the target of “thousands of death threats [and] rape threats” and who would bring negative attention to the facility.<sup>200</sup> She has been unable to find regular work and said that she is unlikely to be able to work in the veterinary profession until this case is resolved.<sup>201</sup>

The record indicates that Respondent has a strong work ethic and is a competent veterinarian who was able to perform the tasks of her profession without any issues until the incident discussed here.

**c. Attitudes toward Feral Cats in some Rural Communities**

The ALJs find, based on the preponderance of the evidence, that the cat killed by Respondent was Tiger, an owned, domestic cat. However, Respondent sincerely believed that she was killing a feral cat, and it is relevant to consider that context.

Respondent’s witness Preston Northrup, a 30-year resident of Washington County, testified that feral cats are a problem in rural Brenham, Texas.<sup>202</sup> Feral cats “kill the rabbits and

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<sup>197</sup> Tr. Vol. 1 at 152.

<sup>198</sup> Tr. Vol. 1 at 153.

<sup>199</sup> Tr. Vol. 1 at 155-56.

<sup>200</sup> Tr. Vol. 1 at 176-77.

<sup>201</sup> Tr. Vol. 1 at 177.

<sup>202</sup> Tr. Vol. 2 at 83.

the birds that live on the ground such as quail,” which makes it difficult to maintain wild game populations for hunting activities, Mr. Northrup said.<sup>203</sup> He noted that he keeps a barn cat to control rodents on his property, but if feral animals “come in to our animals and fight or such like that, [he will] eradicate them.”<sup>204</sup> By “eradicate,” Mr. Northrup said, he meant a kill shot to the head or the heart and lungs. Mr. Northrup testified that he knows others in the community also shoot feral cats because he sells weapons to them and it has been a frequent topic of discussion.<sup>205</sup> He said that he is not in favor of TNR (trap-neuter-release) because trapping the cats takes time, and releasing them just puts “your problem on your neighbor.” Neutering is unappealing to him because feral cats “carry diseases” and he does not want to touch possibly diseased animals.<sup>206</sup>

Veterinary technician Karen Chapman, who worked with Respondent during Respondent’s two years at the Clinic, echoed Mr. Northrup’s sentiments. She noted that trapping a feral cat can be “extremely difficult,” and paying for the vaccinations can be “extremely expensive.”<sup>207</sup> Even if a property owner is able to trap and vaccinate a cat one year, “that doesn’t guarantee that you can catch them the next year and get them revaccinated,” she added. Ms. Chapman said that while it would be ideal, it is “just not practical” to believe that the large populations of feral cats in the countryside can be captured, vaccinated, neutered, and placed “into lovely homes.”<sup>208</sup>

Respondent testified that she grew up in a rural Wyoming community where feral cats presented a significant problem because most families lacked the time and funds to trap, neuter, and/or care for feral cats. She noted that Wyoming law permits the shooting of a “stray cat” at any time and in virtually any manner. Although she grew up with this background in Wyoming and lived in a rural Texas community where other residents shared the belief that eradicating

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<sup>203</sup> Tr. Vol. 2 at 84.

<sup>204</sup> Tr. Vol. 2 at 84.

<sup>205</sup> Tr. Vol. 2 at 85.

<sup>206</sup> Tr. Vol. 2 at 86.

<sup>207</sup> Tr. Vol. 2 at 99.

<sup>208</sup> Tr. Vol. 2 at 95.

feral cats was acceptable, Respondent is not callous or indifferent to feral cats. She testified that one of the stray cats visiting her house, a gray female, was “really nice” and would sleep on the porch. Respondent was trying to socialize the gray cat and get her “warmed up” so that she could be caught humanely.<sup>209</sup>

Mr. Northrup testified that if a cat was on his property and “hassling [his] animals,” he did not find it problematic to kill the cat, even if it was a pet. When asked if he would try to talk to the owner before taking action, he replied, “Not necessarily.”<sup>210</sup> Respondent’s approach is far more nuanced. She was genuine in her testimony that she would not hurt a pet cat, and she made what she believed was an adequate effort (by talking to Dr. Buenger) to find out if the feral orange cat had an owner. The ALJs find that Respondent’s background and the community beliefs and practices described by her witnesses provide context that should be considered in fashioning a sanction.

#### **d. Split of Opinion among Veterinarians regarding Feral Cats**

Staff asserted that Respondent’s conduct was unprofessional because it brought unwanted notoriety to the veterinary profession in Texas. Staff also argued that Respondent demonstrated “a disturbing lack of understanding of the conduct that is expected of a veterinarian” and that she “does not possess the temperament to practice veterinary medicine.”<sup>211</sup>

The ALJs are persuaded by a preponderance of the evidence that the cat at issue in this case was Tiger, and not a feral cat. However, Respondent believed she was shooting a feral cat, and there is no settled understanding in the veterinary profession of “the conduct that is expected of a veterinarian” with respect to the treatment of feral cat populations. Veterinarians disagree about whether gradual reduction of feral cat populations through TNR is possible, or whether the harm caused by feral cats requires more aggressive intervention through euthanasia.

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<sup>209</sup> Tr. Vol. 1 at 158.

<sup>210</sup> Tr. Vol. 2 at 86.

<sup>211</sup> Staff’s Closing Argument at 21.

Dr. Smith noted that feral cats carry diseases such as rabies, are often infested with fleas, can be very destructive to wildlife such as birds and lizards, will spray and defecate on personal property, and get into fights with domestic cats.<sup>212</sup> He said that, based on his 47 years of practice, he feels TNR is not a viable approach to managing feral cat populations because even neutered feral cats that are released back into the environment will kill wildlife, spray, and attack domestic animals.<sup>213</sup>

Clearly, Dr. Smith's opinions are not shared by all veterinarians. Dr. Folger expressed support for the approach of humanely trapping feral cats, finding adoptive homes for those that can be domesticated, and resorting to euthanasia as "a last option."<sup>214</sup> Staff's expert Dr. Golab is Chief Advocacy and Public Policy Officer for the AVMA. She testified that there "has been a lot of disagreement" between veterinarians who believe managed colonies are the best way to reduce feral cat populations over time, and those who believe euthanasia is preferable.<sup>215</sup>

A second area of disagreement among veterinarians is the manner in which a feral cat may be killed. Dr. Folger was emphatic in his testimony that Respondent killed a cat in a "cruel and brutal manner."<sup>216</sup> He testified that he was "shocked" and "bewildered" that a colleague in the profession would commit such an act, which he said was contrary to the moral and ethical values that veterinarians are expected to uphold in their work.<sup>217</sup> On the other hand, Dr. Smith opined that it is not a violation of "the moral and ethical values that underpin the execution of veterinarians' technical duties" if a veterinarian kills feral cats on her property.<sup>218</sup>

Dr. Golab testified that euthanasia, by definition, is "humane," and requires "instantaneous unconsciousness followed by cardiac or respiratory arrest, and eventually full

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<sup>212</sup> Tr. Vol. 2 at 111-15.

<sup>213</sup> Tr. Vol. 2 at 114-15.

<sup>214</sup> Tr. Vol. 2 at 43.

<sup>215</sup> Tr. Vol. 2 at 221-23.

<sup>216</sup> Tr. Vol. 2 at 28-29.

<sup>217</sup> Tr. Vol. 2 at 28-29, 31.

<sup>218</sup> Tr. Vol. 2 at 116.

brain death.”<sup>219</sup> For cats, the AVMA cites intravenous injection as the preferred method of euthanasia. AVMA-accepted methods of physical euthanasia include gunshot and the use of a captive bolt (a device that is driven into and destroys the brain), but even then the AVMA recommends sedation of a cat prior to physical euthanasia because of the difficulty in hitting the brain, a target that is about two inches across.<sup>220</sup>

Other forms of physical euthanasia, according to Dr. Golab, include methods that “destroy or render non-functional the brain regions responsible for cortical integration,” such as “cerebral electrocution [and] blunt force trauma.”<sup>221</sup> Dr. Golab agreed that the physical methods of euthanasia are recognized by AVMA to be “inexpensive, humane and painless if performed properly.”<sup>222</sup> However, Dr. Golab noted that there is no peer-reviewed literature or other evidence on the use and efficacy of a bow and arrow to administer physical euthanasia, and it is not an AVMA-recognized method.<sup>223</sup>

The ALJs are not charged with determining whether Dr. Smith or Dr. Folger has the superior argument. Staff also conceded that the Board has not adopted any specific AVMA policies such as those Dr. Golab discussed.<sup>224</sup> However, the fact of a split in opinion in the profession is directly relevant to a consideration of whether Respondent’s conduct in killing the cat was unprofessional. Respondent targeted what she believed to be a nuisance feral cat, and there is support in the veterinary community for killing feral cats rather than resorting to TNR.

Although Respondent’s use of a bow and arrow is not a recognized method of euthanasia, she killed Tiger in a manner that caused instantaneous death without the cat suffering. Respondent testified that ethical hunting requires the hunter to decide if she has a good shot and

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<sup>219</sup> Tr. Vol. 2 at 224.

<sup>220</sup> Tr. Vol. 2 at 226-27.

<sup>221</sup> Tr. Vol. 2 at 235.

<sup>222</sup> Tr. Vol. 2 at 237.

<sup>223</sup> Tr. Vol. 2 at 246-48.

<sup>224</sup> Tr. Vol. 2 at 218-19.

can make the shot so that the animal does not unnecessarily suffer.<sup>225</sup> She was confident that she could hit the brain, and the evidence indicates that she did so, such that Tiger did not linger and experience pain.

**e. Respondent's Love for Animals**

Respondent spoke of growing up on a Wyoming ranch where her father maintained an outfitting business and the family kept horses and sheep.<sup>226</sup> She said she “loved everything about” taking care of the horses and sheep, and if “there was something going on with the animals, [she] was usually a part of it [and] wanted to [be involved] from a very young age.”<sup>227</sup> She successfully completed an equine medicine internship and worked for two years at the Clinic without any complaints.

Ms. Chapman testified that she worked closely with Respondent for the entire time Respondent was at the Clinic. In Ms. Chapman's view, Respondent was beloved by both clients and Clinic staff, and clients “still love her and support her.”<sup>228</sup> Horse owners in particular “loved the way she handled their horses and truly appreciated everything she did.”<sup>229</sup> Ms. Chapman has been a veterinary technician for eight years, and described Respondent as “one of just a handful of vets” she has worked with who “has never lost her temper at an animal.”<sup>230</sup> Respondent has “a cat of her own that sleeps on her head” and “a dog that sleeps on her couch,” and is “extremely compassionate towards animals,” according to Ms. Chapman.<sup>231</sup>

Respondent was sincere in expressing regret that she did not realize the cat she shot could have been a pet. The evidence fails to show a cruel streak toward animals or lack of moral

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<sup>225</sup> Tr. Vol. 1 at 181-82.

<sup>226</sup> Tr. Vol. 1 at 148.

<sup>227</sup> Staff Ex. 10 at 6.

<sup>228</sup> Tr. Vol. 2 at 100.

<sup>229</sup> Tr. Vol. 2 at 100.

<sup>230</sup> Tr. Vol. 2 at 99.

<sup>231</sup> Tr. Vol. 2 at 99.



compass that would be present if—as claimed by Staff—Respondent truly lacked the temperament to be a caring and empathetic veterinarian.

## **B. Aggravating Factors**

### **1. Misrepresentation Regarding Rabies Concern**

On October 26, 2015, Respondent signed an affidavit that stated, in relevant part, “[t]he subject cat was a feral cat which, given the existing and extensive rabies outbreak in Washington and Austin Counties, I believed was likely rabid.”<sup>232</sup> In her deposition of February 9, 2016, Respondent was asked if, on the night she shot the cat, she believed it had rabies. She replied, “No.”<sup>233</sup> At hearing, Respondent again agreed that the affidavit mentioned her belief that the cat had rabies, which was wrong.<sup>234</sup> She conceded that, if she had been concerned about the cat being rabid, she would have saved the head for testing and would not have disposed of the body in a dump pit.<sup>235</sup>

Respondent was under tremendous stress, given the “thousands of death threats [and] rape threats [she] received through e-mail, phone, [and] text message.”<sup>236</sup> Nonetheless, as an adult of sound mind, Respondent is responsible for reading and verifying her sworn statements before signing them. The ALJs find this misrepresentation may be considered an aggravating factor, though it is mitigated by Respondent’s prompt admission during her deposition and at hearing that the statement in the affidavit was incorrect.

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<sup>232</sup> Resp. Ex. 24 at 1.

<sup>233</sup> Staff Ex. 10 at 34.

<sup>234</sup> Tr. Vol. 1 at 131-32.

<sup>235</sup> Tr. Vol. 1 at 131.

<sup>236</sup> Tr. Vol. 1 at 177.

## **2. Inadequacy of Efforts to Ascertain Ownership of Cat**

Respondent was reckless in taking a lethal shot at the cat before confirming that it was the same animal that had been fighting with her cat, and that it did not have an owner. When Respondent discussed the feral cat with Dr. Buenger, she learned that it was not his, and that he did not know whether it belonged to anyone else. Respondent claimed that because she had the permission of the landowner to “take care of” the cat, she had the necessary authority to kill it. However, Respondent admitted that even cats that are owned may be found roaming outside, and said that she would never have taken the shot if she had known the cat she killed was someone’s pet.<sup>237</sup> Orange tabby cats are common cats and the evidence indicates there were other orange-and-white cats in the vicinity. At a distance of 20 yards, Respondent could not tell whether the cat was the same one she had seen before (*i.e.*, whether it had fleas, a mangy coat, and a bad odor). Her reckless conduct may be considered an aggravating factor.

### **C. Classification of Violation**

Staff argued that Respondent committed a Class A violation and that her license should be revoked because she presents “imminent peril to the public” if she is allowed to continue practicing. The ALJs disagree. Respondent’s act of shooting the cat was a split-second, spontaneous act. There is no indication that Respondent has a character flaw that makes her a continuing threat to animals or people or an “imminent peril to the public” in any way.

On the other hand, the ALJs find the conduct to be more serious than a Class C violation (which includes “minor” violations in which no hazard is created to public health, safety, or welfare, and there is no economic harm to property or the environment). Although no hazard to public health, safety, or welfare was shown, and there was no demonstrated economic harm, Tiger’s killing caused grief for the Johnsons and Ms. Hemsell. The ALJs conclude that a Class B violation is more appropriate.

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<sup>237</sup> Tr. Vol. 1 at 141, 146-47.

**D. Recommended Sanction**

Class B violations may result in the following maximum penalties:

- one to 10-year license suspension with none, all, or part probated;
- a penalty not exceeding \$5,000 for each violation per day;
- continuing education in a specified field related to the licensee's practice that the Board deems relevant to the violation(s);
- quarterly reporting certifying compliance with board orders; and/or
- a requirement that the licensee sit for, and pass, the SBE, LVTE, or EDPE.<sup>238</sup>

The ALJs recommend that the Board issue a five-year suspension of Respondent's license, with four years fully probated, and the entire period subject to quarterly reporting requirements. The Board should also require Respondent to complete continuing education hours in the areas of veterinary jurisprudence and animal welfare (and/or such other subjects as the Board sees fit). Finally, although community service is not listed in Board Rule 575.25(b)(2), that rule lists "recommended" sanctions and is not exclusive. The ALJs suggest that Respondent may benefit from a community service requirement of at least 100 hours of volunteering time at a feline rescue, free spay/neuter clinic, or similar facility.

Allowing Respondent to continue practicing (after one year of full suspension) with regular monitoring and reporting of any complaints against her will permit an otherwise competent veterinarian who made a single, serious mistake of judgment to prove that she is still capable of representing the profession and serving the needs of patients and the public.

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<sup>238</sup> 22 Tex. Admin. Code § 575.25(b)(3). The SBE is the State Board Examination, the LVTE is the Licensed Veterinary Technician Examination, and the EDPE is the Equine Dentistry Provider Examination.

## VI. SUMMARY

In conclusion, the ALJs find that Staff established that Respondent killed an owned cat without the effective permission of the owner; the conduct was reckless; and, the defenses of depredation and justification are unavailable. These facts, shown by a preponderance of the evidence, amount to a violation of Texas Penal Code § 49.092(b)(2). Respondent's illegal act was connected to the practice of veterinary medicine because it involved animal cruelty, and Board Rule 573.4 states that offenses listed in Board Rule 575.50(f), which include animal cruelty, are "connected with" a veterinary licensee's practice. Therefore, Respondent is subject to sanction under Act § 801.402(4). Respondent acted under the guise of the practice of veterinary medicine because her caption for the Facebook post linked the conduct to the veterinary profession, making the act a violation of the Board's Rules of Professional Conduct. As a result, Respondent also is subject to disciplinary action under Act § 801.402(6).

Respondent's actions are mitigated by the fact that Tiger died instantaneously and did not suffer; the opinion of Tiger's owners that Respondent should be allowed to learn and build her character from this experience; the absence of a hazard or risk to public health, safety, or economic welfare; the lack of economic harm to property or the environment; the lack of any history of prior misconduct or crimes; the achievement of deterrence without the need for revocation of Respondent's license; Respondent's mistaken but sincere belief that she was committing a legal act for which she had permission; her strong academic and work record prior to the incident; the attitude in some rural communities that it is permissible and necessary to kill feral cats; the split of opinions within the veterinary profession regarding treatment of feral cat populations; and Respondent's passion for animals and genuine desire to never hurt a pet animal. Her actions are aggravated by the misrepresentation concerning rabies, and her inadequate efforts to determine the cat's ownership and identity.

Based on the evidence, the ALJs classify Respondent's offense as a Class B violation and recommend, as discussed above, a partly-probated five-year suspension with quarterly monitoring, continuing education, and community service.

## VII. FINDINGS OF FACT

1. Kristen Lindsey, D.V.M. (Respondent) is licensed as a veterinarian by the Texas Board of Veterinary Medical Examiners (Board). The Board issued to Respondent Texas Veterinary License No. 12622 on June 25, 2012.
2. On March 31, 2016, the Board's staff (Staff) issued its First Amended Notice of Hearing.
3. The Notice of Hearing contained a statement of the time, place, and nature of the hearing; a statement of the legal authority and jurisdiction under which the hearing was to be held; a reference to the particular sections of the statutes and rules involved; and a short plain statement of the factual matters asserted.
4. The hearing on the merits was held April 25-26, 2016, before Administrative Law Judges (ALJs) Catherine C. Egan and Pratibha J. Shenoy at the hearing facilities of the State Office of Administrative Hearings (SOAH), 300 West 15th Street, Fourth Floor, Austin, Texas. Staff Attorney Michelle Griffin represented Staff. Attorney Brian Bishop represented Respondent. The record closed on July 8, 2016, after submission of written closing arguments by the parties.
5. Respondent's pleas to the jurisdiction were denied in Order No. 5 (January 22, 2016) and Order No. 10 (April 19, 2016) because they did not state a basis on which SOAH ALJs are empowered to act.
6. Respondent graduated from the University of Wyoming with a bachelor's degree in biology in 2006. Respondent received a full scholarship for her college education.
7. In 2012, Respondent received her D.V.M. degree from Colorado State University College of Veterinary Medicine.
8. Respondent successfully completed a one-year equine medicine internship and was offered a permanent position at Equine Sports Medicine & Surgery in Weatherford, Texas.
9. In July 2013, Respondent began working at Washington Animal Clinic (the Clinic) in Brenham, Texas. At the Clinic, Respondent specialized in equine medicine, but also treated cats and dogs.
10. Respondent lived in a rental property owned by Bruce Buenger, D.V.M., a senior veterinarian and one of the owners of the Clinic. Respondent's rental property abutted Dr. Buenger's home and property.
11. In late March and early April 2015, Respondent noticed a feral, orange, male tabby cat visiting her property.

12. Respondent had also seen two other stray cats: a black-and-white cat and a gray, female cat.
13. Because the gray cat was friendly and slept on her porch, Respondent was trying to socialize the cat so Respondent could catch her humanely.
14. Respondent began finding cat feces in her horse feed troughs and attributed it to the feral, orange, male tabby cat.
15. Respondent observed the feral tabby fighting with her own pet cat on the porch of her property, and was concerned that her cat would be injured.
16. Beginning in December 2014, Respondent engaged in target practice with a bow and arrow, shooting at archery blocks she set up in her yard.
17. On the night of April 13, 2015, Respondent observed the feral cat fighting with her cat on her porch, and scared it away.
18. The next day, Respondent mentioned her problems with the feral cat to Dr. Buenger. Respondent learned that Dr. Buenger did not own the cat and did not know if anyone did, and he had seen the cat but had not experienced any trouble with it before.
19. Respondent saw Dr. Buenger as her mentor and sought his advice on personal as well as professional veterinary matters.
20. Respondent asked Dr. Buenger what to do about the cat, and recalls that he stated, "Take care of it."
21. Respondent understood Dr. Buenger's statement to mean that she had permission from the landowner to kill what she believed was a feral cat straying onto the property.
22. On the evening of April 15, 2015, Respondent was practicing archery when she turned and saw an orange cat approximately 20 yards away.
23. Believing she was shooting the feral cat that had been a nuisance on her property, Respondent took aim and shot an arrow at the cat's head.
24. Respondent placed the shot based on her experience hunting since she was 10 years old, and her familiarity with where to place a shot to instantly kill an animal.
25. The arrow struck the cat through the head, and it died instantaneously without suffering.
26. Approximately five to ten minutes after Respondent shot the cat, Respondent's mother took a photograph of Respondent holding the shaft of the arrow with the dead cat dangling down.

27. After taking the photograph, Respondent disposed of the cat's body in a dump pit behind her property.
28. One to two hours after the photograph was taken, Respondent posted it on her Facebook page with the caption: "My first bow kill [cat emoticon] lol. The only good feral tomcat is one with an arrow through it's [sic] head! Vet of the year award . . . gladly accepted [crying/laughing emoticon]."
29. Respondent meant the caption to be facetious because she knew it was the type of conduct and comment that the general public did not expect from a veterinarian.
30. The Facebook post quickly achieved national and international distribution. Respondent became aware of the media attention late in the day on April 16, 2015, and deleted the Facebook post.
31. Also on April 16, 2015, Respondent learned that some viewers of the Facebook photograph believed the cat she killed to be Tiger, a neutered orange tabby belonging to her neighbors across the street.
32. Respondent returned to the dump pit and retrieved the cat's body to take a photograph of its genital area in order to prove that the cat she shot had testicles.
33. The remains were partially eaten by other animals before the photograph was taken. The photograph of the remains is blurry and it is not possible to determine whether certain features in the picture are intact testicles belong to an unneutered cat, or the prepuce and atrophied scrotal sac of the neutered cat believed to be Tiger.
34. A pet sitter who took care of Tiger took a video in November 2014 of Tiger riding with her on a small utility vehicle as she drove around his owners' property.
35. The cat in Respondent's Facebook photograph and the cat in the video (Tiger) have a very close resemblance with respect to a band of white fur down the trachea extending halfway up the cervical area, a belt of white fur on the left-hind thigh extending in a semicircle from the knee to the back part of the leg, and a single stripe going towards the eye on the left side.
36. Based on Tiger's distinctive fur markings and the fact that Tiger went missing at the time of the shooting and has not been seen since, a preponderance of the evidence establishes that the cat that Respondent shot and displayed in her Facebook photograph is Tiger.
37. Respondent did not have the effective consent of Tiger's owners before she shot and killed the cat.
38. An orange tabby is a common cat, and there were other orange-and-white cats in the vicinity of Respondent's property.

39. Respondent took aim and shot the cat within 20 seconds of noticing it, and at a distance of 20 yards. Respondent could not ascertain in that period of time and at that distance whether the cat was the same feral cat she had observed previously.
40. Respondent did not ask any of her neighbors, other than Dr. Buenger, whether they owned the feral cat; attempt to use a humane trap; call Animal Control; or take other non-lethal actions before shooting the cat.
41. If Respondent had suspected the cat was a pet, she would not have taken the shot.
42. Respondent's conduct in shooting the cat was reckless because she disregarded the risk that the cat was a pet and killing or injuring it would cause emotional pain and suffering to its owner. An ordinary person exercising care would not have shot the cat under those circumstances.
43. The Clinic terminated Respondent's employment on April 17, 2015, because of her actions in taking and posting the Facebook photograph. Respondent has not been employed as a veterinarian since that date.
44. As a result of the Facebook post, Respondent and her family began receiving threats of rape, bodily injury, and death via mail, telephone, email, and text message.
45. On June 24, 2015, a criminal charge of Cruelty to Non-Livestock Animals was presented to a grand jury in Austin County, Texas. The grand jury returned a Notice of No Bill, ending the criminal prosecution of Respondent.
46. Respondent's caption on the Facebook post directly linked her actions to the veterinary profession.
47. The Board received thousands of complaints from private citizens, veterinary professionals, animal welfare groups, and others. Tiger's owners filed a complaint with the Board, leading to an investigation and the docketing of this case at SOAH.
48. Tiger's owners support a sanction that would permit Respondent to learn from this experience and build her character.
49. Respondent's conduct did not cause a hazard or risk to public health, safety, or economic welfare, and did not result in economic harm to property or the environment.
50. Respondent has no prior history of misconduct or criminal activity.
51. Respondent has been deterred from similar reckless actions in the future.
52. Respondent held a mistaken but sincere belief that she was committing a legal act for which she had permission.



53. Respondent's decision to shoot the cat was a split-second, spontaneous action.
54. Prior to the incident, Respondent maintained a strong academic and work record.
55. Respondent grew up in a rural community in north central Wyoming, where state law permits the killing of stray cats with few restrictions.
56. In Respondent's experience, rural communities often face problems attempting to control feral cat populations, and lack the resources to trap, neuter, vaccinate, and release feral cats.
57. Some residents in Respondent's rural Texas community dispatch feral cats by gunshot to the head or heart and lungs.
58. There is disagreement among professional veterinary association members as to the proper management of feral cat populations.
59. Respondent does not have a predilection for mistreating or neglecting animals.
60. Respondent's focus is equine medicine and she is not likely to have much contact with small animals in the course of her practice.
61. Respondent is a caring and affectionate pet owner and treats her patients with patience and compassion.
62. Respondent signed a sworn statement on October 26, 2015, in which she untruthfully attested that she believed the cat she killed likely had rabies.
63. In a February 2016 deposition and at hearing, Respondent admitted that she did not believe the cat had rabies and accepted fault for the misrepresentation.
64. The killing of Tiger caused grief for his owners and pet sitter.
65. Respondent's conduct is not a minor violation; however, Respondent is not an imminent threat to the public.

### **VIII. CONCLUSIONS OF LAW**


1. The Board has jurisdiction and authority to take disciplinary action against a licensee who engages in dishonest or illegal practices in, or connected with, the practice of veterinary medicine, or who violates the Board's Rules of Professional Conduct. Tex. Occ. Code §§ 801.401, .402(4), (6).

2. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this matter, including the preparation of a proposal for decision with findings of fact and conclusions of law. Tex. Gov't Code Ch. 2003; Tex. Occ. Code § 801.407.
3. Proper and timely notice of the hearing was provided. Tex. Gov't Code §§ 2001.051, .052.
4. Staff had the burden of proving the case by a preponderance of the evidence. 1 Tex. Admin. Code § 155.427.
5. A misdemeanor or felony offense involving animal cruelty is an offense connected with to the veterinary profession. 22 Tex. Admin. Code § 575.50(f)(5)(J).
6. The Board may take disciplinary action based on proof of the commission of an act while in the practice of, or under the guise of the practice of, veterinary medicine, with or without a complaint, indictment, or conviction of a law violation. 22 Tex. Admin. Code § 573.4.
7. Staff proved by a preponderance of the evidence that Respondent committed the elements of the offense of Cruelty to Non-Livestock Animals under Texas Penal Code § 42.092(b)(2), in that Respondent killed an owned cat without the effective consent of the owner, and her conduct recklessly ignored the risk that the cat had an owner. Further, Respondent has not proven any of the defenses permitted. Respondent is subject to discipline pursuant to Texas Occupations Code § 801.402(4).
8. Staff proved by a preponderance of the evidence that Respondent violated one of the Board's Rules of Professional Conduct by committing conduct constituting Cruelty to Non-Livestock Animals while acting under the guise of the practice of veterinary medicine. Respondent is subject to discipline pursuant to Texas Occupations Code § 801.402(6).
9. Among the Board's disciplinary powers is the authority to revoke or suspend a license, reprimand a license holder, impose administrative penalties, and require license holders to participate in continuing education programs. Tex. Occ. Code §§ 801.401, .451.
10. The Board has promulgated a Recommended Schedule of Sanctions that must be considered by the ALJs and the Board in determining the appropriate sanctions. Tex. Occ. Code § 801.407(c); 22 Tex. Admin. Code § 575.25.
11. Under the Board's schedule of recommended sanctions, Respondent's conduct is properly characterized as a Class B violation, for which the Board is authorized to impose maximum penalties that may include a one to 10-year license suspension with none, all, or part probated; a penalty not exceeding \$5,000 for each violation per day; continuing education in a specified field related to the licensee's practice that the Board deems relevant to the violation(s); quarterly reporting certifying compliance with Board orders;

and/or a requirement that the licensee sit for and pass the appropriate licensing examination. 22 Tex. Admin. Code § 575.25(b)(3).

12. The Board should issue a five-year suspension of Respondent's license, with four years fully probated, and the entire period subject to quarterly reporting requirements; require Respondent to complete continuing education hours in the areas of veterinary jurisprudence and animal welfare (and/or such other subjects as the Board sees fit); and impose a community service requirement of at least 100 hours of volunteering time at a feline rescue, free spay/neuter clinic, or similar facility.

**SIGNED August 15, 2016.**

  
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CATHERINE C. EGAN  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS

  
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PRATIBHA J. SHENOY  
ADMINISTRATIVE LAW JUDGE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS